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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
D.C. No. A85-184 consolidated with A85-201

PEOPLE OF THE VILLAGE OF GAMBELL, PEOPLE OF THE VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR,
DEFENDANTS-APPELLEES,

ARCO ALASKA, INC., AMOCO PRODUCTION COMPANY, ET AL., DEFENDANTS-INTERVENORS-APPELLEES.

OPINION

Appeal from the United States District Court
for the District of Alaska
J.A. von der Heydt, District Judge, Presiding

Argued and submitted September 4, 1985
Seattle, Washington

Before: PREGERSON and ALARCON, Circuit Judges, and DIMMICK, District Judge*

ALARCON, *Circuit Judge*:

The People of the Village of Gambell, et al. (hereinafter the Villages),[1] appeal from an order of the district court of Alaska denying consolidated motions for a preliminary in-

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* Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, sitting by designation.

[1] On this appeal from consolidated motions for preliminary injunction, the Villages include the People of the Village of Gambell and The

junction. The requested injunction would prohibit exploration for oil and gas on two tracts leased to appellees/intervenors, Arco Alaska, Inc. and Amoco Production Co., et al. (hereinafter the Oil Companies), by the United States Department of the Interior on federally owned lands in the outer continental shelf of Alaska.

We must determine whether the district court abused its discretion in failing to issue a preliminary injunction notwithstanding its determination that the Villages had a "strong likelihood of success on the merits" in light of the presumption of harm flowing from a violation of a statute and the facts in the record showing the possibility of a significant restriction of subsistence use. We conclude that the district court abused its discretion in denying a preliminary injunction because it failed to give proper weight to Congress's expressly stated policy of protecting the subsistence needs and culture of Native Alaskans against the harm which may result from the lease of public lands in the outer continental shelf.

PERTINENT FACTS

This matter is again before this court following our decision in *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (hereinafter *Gambell I*). In *Gambell I*, the People of the Village of Gambell and the People of the Village of Stebbins brought an action in the district court to enjoin the sale of leases located in federally owned outer continental shelf land in Lease Sale 57. The Secretary of the Interior (hereinafter the Secretary) had offered to sell the leases for oil and gas exploration pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (as

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People of the Village of Stebbins, two Alaskan Native Tribes organized under the Indian Reorganization Act. Also included is Nunam Kitlutsisti, an intertribal organization representing subsistence users from 56 villages of the Yukon-Kuskokwian Delta in southwestern Alaska.

amended 1980) (hereinafter the Lands Act). Bids were submitted by the oil companies. Lease Sale 57 consists of approximately 2.4 million acres in the Norton Sound Basin twenty-five miles off the western shore of Alaska.

In *Gambell I* the Villages presented two arguments to the district court in support of their request for an injunction. First, the Villages contended that the sale of leases for oil and gas exploration would interfere with their aboriginal hunting and fishing rights. Second, they asserted that the Secretary failed to evaluate the impact of such laws on the subsistence culture of Native Alaskans as required by section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1980) (hereinafter the Conservation Act) prior to conducting the sales. The district court denied the Villages' motion for a preliminary injunction and granted the Secretary's motion for summary judgment. The district court held that the Villages' aboriginal hunting and fishing rights and their rights protected under section 810 of the Conservation Act did not extend to the outer continental shelf outside the territorial boundaries of Alaska.

In his briefs before this court in *Gambell I,* the Secretary argued that if this court " '[s]hould . . . find it appropriate to order the Secretary to carry out the procedures of section 810, there is no need to undo what has already been done. The proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply.' " (Appellants' Reply Brief at 4, *quoting* Brief for Federal Appellees (*Gambell I*), at 49). The oil companies made a similar but more specific recommendation in their brief in *Gambell I.* " 'If this court should hold that § 810 of ANILCA applies to the OCS [outer continental shelf], the appropriate remedy would be . . . to enjoin further activities until the Secretary completes the procedures required by the statute, if irreparable harm is shown, *see Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982). ' " (Appellants' Reply Brief at 4, *quoting* Brief of Appellee Arco Alaska, Inc. (*Gambell I*), at 49).

We held in *Gambell I* that the Villages' claims to an aboriginal right to hunt and fish in Norton Sound and in the waters in the outer continental shelf were extinguished by the Alaska Native Claims Settlement Act (hereinafter Claims Settlement Act), 43 U.S.C. §§ 1601-1628 (1971), but that in section 810 of Title VIII of the Conservation Act, Congress provided protection for subsistence uses of the fish and wildlife in the waters and ice over the outer continental shelf by requiring the Secretary to evaluate the effect of a lease sale on subsistence use. *Gambell I*, 746 F.2d at 579-82. In reversing the district court's orders in *Gambell I*, we gave the following direction to the district court:

> Appellants ask that the lease sale be voided because the Secretary has not complied with the requirements of section 810. Appellees contend that the Secretary has substantially complied with the requirements of the section, albeit acting under other statutes, and if he has not, the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810, citing *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *reversed on other grounds*, _____ U.S. _____, 104 S. Ct. 656, 78 L.Ed.2d 496 (1984).
>
> These arguments raise factual and legal issues that have not been but should be considered initially by the district court.

Gambell I, 746 F.2d at 582-83.

Gambell I was argued before this court on October 7, 1983. On April 17, 1984, while the matter concerning Lease Sale 57 was still under submission to this court, the Secretary held a sale of leases on Lease Sale 83 in the outer continental shelf lands in the Navarin Basin off the shore of Alaska. This court filed its opinion in *Gambell I* on November 2, 1984. Due primarily to delays requested by the Secretary, the decision in *Gambell I* did not become final until mandate issued on March 2, 1985.

On April 3, 1985, the People of the Villages of Gambell and Stebbins brought a motion for preliminary injunction to halt exploratory activities on Lease Sale 57.

On April 25, 1985, the People of the Village of Gambell and the intertribal organization of Nunam Kitlutsisti filed a separate action to enjoin future exploratory activities on Lease Sale 83 and to rescind the authority previously granted to the Oil Companies in that portion of the outer continental shelf. Lease Sale 83 consists of approximately 37 million acres and is located in the water of the Bering Sea in the outer continental shelf due west of St. Mathews Island, approximately 250 miles from the mainland of Alaska.

This separate complaint was based on precisely the same grounds alleged in the prior action (*Gambell I*) concerning Lease Sale 57: i.e., that the Secretary failed to comply with section 810 of the Conservation Act prior to authorizing exploratory activities in the waters over the outer continental shelf. The district court consolidated these matters for the hearing on the Villages' motion for a preliminary injunction.

The district court applied the "traditional" test for determining whether injunctive relief is warranted, and denied the request for a preliminary injunction. The district court first explained that the Secretary did not comply with the requirements of section 810 of the Conservation Act because he failed to evaluate the subsistence impacts of the leases with the mandate of that law clearly in mind. After finding that "delay in the exploration of the OCS [outer continental shelf] many cause irreparable harm to this nation's quest for new oil resources and energy independence," the court nonetheless concluded:

(1) Movants have established a strong likelihood of success on the merits.

(2) The balance of irreparable harm does *not* favor the movants.

(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS

> [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.

On May 30, 1985, the district court issued a minute order *sua sponte* stating that:

> The court has been informed that its denial of plaintiffs' motion for preliminary injunction will be appealed to the Ninth Circuit. In order to expedite the appeal, and for the reasons stated in this court's earlier order, the court indicates that it will not entertain a motion for stay pending appeal.

On June 6, 1985, a motions panel of this court issued an order denying the Villages' emergency motion for an injunction pending appeal. The Secretary and the Oil Companies were ordered to file, within seven days, a hold harmless agreement "that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands." The motions panel retained jurisdiction of this matter for "the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement." The hold harmless agreement was approved by the motions panel on June 21, 1985.

DISCUSSION

Our review of a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The decision to grant or deny is within the discretion of the trial court and will only be reversed if that discretion has been abused or if the decision is based on erroneous legal standards or clearly erroneous findings of fact." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

A. *Applicability of the Traditional Test*

This court has recognized two sets of standards for evaluating a claim for injunctive relief. We refer to one as the "traditional" test and the other as the "alternative" test. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983). In *American Motorcyclist Ass'n* we described the traditional test as follows: "The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 965.

"The 'alternative' test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor." *Id.* (*citing Benda v. Grand Lodge of IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975)).

We have concluded, however, that the traditional and the alternative tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." *Benda v. Grand Lodge of IAM,* 584 F.2d at 315. *Accord, Regents of University of California v. ABC,* 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We have also noted that "[t]he difference between the two formulations is insignificant. Therefore, we accept either as satisfactory." *Benda,* 584 F.2d at 315. Because the district court employed only the traditional test, we will review the findings under that formulation. *See Regents of University of California v. ABC,* 747 F.2d at 515-16 n.4 (where the district court made a

finding that the public interest favored the issuance of the preliminary injunction, this court reviewed the district court's findings under the traditional standard).

B. *Likelihood of Success on the Merits*

The Villages argue that the district court properly determined that they had established "a strong likelihood of success on the merits" on their claim that the Secretary could not have substantially complied with the provisions of the Conservation Act because he did not have its mandates "clearly in mind." The district court correctly concluded that an administrative decision compelled by a land preservation statute must be made with the requirements imposed by Congress clearly in mind. *See Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 445 (9th Cir.) ("a court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the highway project with the mandates of section 4(f) clearly in mind"), *cert. denied,* 429 U.S. 999 (1976). *Accord, Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982).

Prior to Lease Sale 57 and Lease Sale 83, the Secretary did not have the requirements of Congress in mind because it was his contention that section 810 of the Conservation Act did not apply to land beneath the water of the outer continental shelf off the coast of Alaska. Section 810(a) of the Conservation Act provides in pertinent part as follows:

> In determining whether to . . . lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee *shall evaluate* the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

16 U.S.C. § 3120(a) (1982) (emphasis added). Therefore, in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses and needs of the Native Alaskans who are part of the Villages.

We agree with the district court's determination that the Secretary failed to comply with the mandatory requirements of section 810(a). In *Kunaknana v. Clark,* 742 F.2d 1145 (9th Cir. 1984), we said that section 810(a) "requires the agency to evaluate the effects upon subsistence needs of leasing the particular tracts tentatively selected . . . ." *Id.* at 1151. After *Gambell I,* it is clear that section 810(a) does apply to public lands in the outer continental shelf.

The Secretary contends, however, that his compliance with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321-4347 (1976) (hereinafter the Environmental Act or NEPA) and the Lands Act is sufficient to satisfy the evaluation provisions of section 810(a) of the Conservation Act. The Secretary asserts that "[T]here is no additional requirement that the agency decision maker have one statute in mind rather than another when he takes the action." This argument completely ignores this court's observation in *Gambell I* that section 810 was enacted because "the Secretary and the state [of Alaska] failed to heed Congress's admonition [that they take any action necessary to protect subsistence needs of Alaskan Natives]." *Gambell I,* 746 F.2d at 580.

The uncontradicted facts in this matter establish that the Secretary deliberately ignored the specific requirements of section 810(a) prior to the lease sales because of his erroneous belief that its provisions did not apply to the outer continental shelf. Nevertheless, we are now told that the Secretary complied with the Conservation Act prior to the lease sales because in meeting the requirements of the Environmental Act and the Lands Act he inadvertently con-

sidered the needs of the subsistence users. If we were to adopt this surprising contention, we would render section 810(a) superfluous and assume that its enactment was an idle act. "We should not and do not suppose that Congress intended to enact unnecessary statutes." *Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977).

It is quite true that section 810(a) makes reference to the Environmental Act. Section 810(a)(2)(b) provides as follows:

> If the Secretary is required to prepare an environmental impact statement pursuant to [Section 102(2)(c) of the National Environmental Policy Act], *he shall* provide the notice and hearing and *include the findings required by subsection (a) of this section* as part of such environmental impact statement.

16 U.S.C. § 3120(b) (1982) (emphasis added). It is clear to us from this language that Congress intended that the section 810(a) requirement that the Secretary evaluate and make findings concerning subsistence needs *supplements* any overlapping duties which he may have under the Environmental Act.

In support of his contention that compliance with the Lands Act and The Environmental Act constitutes substantial compliance with the requirements of section 810(a) of the Conservation Act, the Secretary refers us to *Life of Land v. Brinegar,* 485 F.2d 460, 474 (9th Cir. 1973), *cert. denied,* 416 U.S. 961 (1974), *Citizens Airport Comm. v. Volpe,* 351 F. Supp. 52 (E.D. Va. 1972), *Environmental Defense Fund, Inc. v. Froehlke,* 473 F.2d 346, 356 (8th Cir. 1972), *Cape Henry Bird Club v. Laird,* 484 F.2d 453, 454 (4th Cir. 1973), and *Missouri ex rel. Ashcroft v. Dep't. of Army,* 526 F. Supp. 660, 667 (W.D. Mo. 1980), *aff'd,* 672 F.2d 1297 (8th Cir. 1982). These authorities do not support the Secretary's contention that

compliance with either the Lands Act or the Environmental Act constitutes de facto compliance with the Conservation Act.

In *Brinegar,* we held that an environmental impact statement prepared pursuant to the Environmental Act may be considered as the finding of no adverse environmental effect required under section 16(c)(4) of the Airport and Airways Development Act of 1970 because each statute contains virtually the same requirements. 485 F.2d at 474. In *Citizens Airport Comm.,* the district court noted, in passing, that "[t]he fact that the impact statement was prepared for the purpose of satisfying NEPA does not prevent its being used to satisfy the requirements of § 1716 [of the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.*] if, in fact, it contains all of the findings demanded by that provision." 351 F. Supp. at 59. In *Environmental Defense Fund, Inc. v. Froehlke,* the court held that if an agency complies with the Environmental Act, it will " 'automatically take into consideration all of the factors required by the Fish and Wildlife Act and it is not reasonable to require them to do both separately.' " 473 F.2d at 356 (*quoting Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F. Supp. 749, 754 (E.D. Ark. 1971), *vacated on other grounds,* 342 F. Supp. 1211 (E.D. Ark. 1972)). We have no quarrel with the proposition that if the environmental concerns expressed in one statute are "automatically" taken into consideration on complying with the requirements of another Act of Congress, it would not be reasonable for the courts to insist on separate reports. As noted above, however, it was the failure of the Secretary to protect subsistence needs under existing administrative authority which compelled Congress to enact section 810(a). *Gambell I,* 746 F.2d at 580.

We previously have held that "compliance with one environmental statute does not assure compliance with

another." *Adler v. Lewis,* 675 F.2d at 1096. Where each statute mandates separate and distinct procedures, compliance with the requirements of one does not compel the conclusion that the provisions of the other statute were considered. *Id.* Neither the Environmental Act nor the Lands Act sets forth procedures to ensure the protection of subsistence needs and uses. In contrast, the Conservation Act was created "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." Conservation Act § 101(c), 16 U.S.C. § 3101 (c) (1982).

As we noted in *Gambell I,* "Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife 'is essential to [their] existence'." *Id.* at 580 (*quoting* Conservation Act § 801(1), 16 U.S.C. § 3111(1)(1980)). The separate and distinct procedures set forth in section 810(a) of the Conservation Act were enacted to fulfill that purpose. The Environmental Act and the Lands Act do not, by their terms, seek to advance the same Congressional goals. For purposes of resolving the issues presented in reviewing the denial of a preliminary injunction, we conclude that the district court did not err in its determination that there was a strong likelihood that the Villages would succeed at trial on the merits in their legal contention that substantial compliance with the Environmental Act and the Lands Act would not constitute automatic or substantial compliance with the Conservation Act.

The district court also concluded that the Villages had a strong likelihood of success on the merits of their contention that the Secretary violated the notice, hearing, and findings requirements of section 810(a)(1)-(3) in connection with Lease Sale 57. We agree.

Under section 810(a)(1)-(3), the Secretary is prohibited from leasing public lands without complying with the notice and hearing procedures if the agency concludes that

the proposed action "may significantly restrict subsistence uses." *Kunaknana v. Clark,* 742 F.2d at 1151. After receiving this court's opinion in *Gambell I,* the Secretary conducted a post-sale study concerning Lease Sale 57. That report contains the finding that while the lease and exploration stages will not significantly restrict subsistence, development and production "may significantly restrict subsistence uses in certain areas." We made it clear in *Kunaknana* that under the express language of section 810(a)(3), the Secretary was required to comply with the notice and hearing requirements of the statute to determine *inter alia* whether " 'such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands.' " 742 F.2d at 1150-51 (*quoting* section 810(a)(3)).

The Secretary agrues that he was not required to comply with the notice and hearing requirements of section 810(a)(1)-(3) prior to the sale of the leases with respect to the significant restriction of subsistence use that may develop at the production stage. The Secretary relies on *Secretary of Interior v. California,* 464 U.S. 312 (1984). His reliance is misplaced. First, in *Secretary of the Interior v. California,* the Supreme Court did not concern itself with a construction of section 810(a)(1)-(3) of the Conservation Act. The Court was faced with the question whether section 307(c)(1) of the Coastal Zone Management Act applies prior to a lease sale. *Id.* at 315. As the district court in the instant matter correctly noted, the decision of the Supreme Court that the Coastal Zone Management Act did not apply to lease sales was premised on the fact that Congress had recognized "four distinct statutory stages to developing an offshore oil well." *Id.* at 337. The four steps set forth in the Lands Act are as follows:

1. The planning of a five-year nationwide leasing program. 43 U.S.C. § 1344.

2. The lease sale. 43 U.S.C. § 1337(a).
3. Exploration. 43 U.S.C. § 1340.
4. Development and production. 43 U.S.C. § 1351.

In the Conservation Act, however, Congress has expressly provided for a specific and detailed procedure to be followed in evaluating the impact on subsistence use of the lease of public land for exploratory activities. As this court pointed out in *Kunaknana v. Clark*, section 810(a) of the Conservation Act requires a hearing *before* a lease shall be effected if such lease "or other use, occupancy or disposition of such [public] lands" may significantly restrict subsistence use. 742 F.2d at 1150-51. "It is a basic rule of statutory construction that a specific statute controls over a general statute. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981). If we were to hold that the more general statute controls over the specific one, we would effectively eliminate the specific statute." *Edward D. Rollert Residuary Trust v. C.I.R.*, 752 F.2d 1128, 1133 (6th Cir. 1985).

The district court did not err in determining, for purposes of ruling on the Villages' motion for a preliminary injunction, that the Villages had demonstrated a strong likelihood of success on the merits of their contention that the Secretary failed to comply with the notice and hearing requirements of the Conservation Act concerning Lease Sale 57. We are satisfied that there is a strong likelihood of success on the merits of the Villages' argument that the specific procedural requirements of section 810(a)(1)-(3)—which are triggered by the threat of a significant restriction of subsistence use—were intended by Congress to serve as an exception to the general provisions of the Lands Act.

C. *Balance of Irreparable Harm*

Notwithstanding its determination that the Secretary violated the procedural requirements of section 810(a) of

the Conservation Act, the district court denied the Villages' request for a preliminary injunction. The district court's ruling is not consistent with the law of this circuit. An injunction is the appropriate remedy for a substantive procedural violation of an environmental statute. *See Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985). "Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). In *Save Our Ecosystems v. Clark,* we also noted that "[o]nly in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation." *Id.* at 1250. " 'It does not appear that any lower court, much less the Supreme Court, has ever found in a proceeding on the merits that federal actions violating NEPA could continue in opposition to the statutory mandates.' " *Id.* at 1250 n.15 (*quoting* Plater, *Statutory Violations and Equitable Discretion,* 70 Cal. L. Rev. 524, 575 (1982)).

Mindful of the law in this circuit, the district court concluded that there were unusual circumstances in the instant matter which made the issuance of an injunction "inappropriate." However, the court did not articulate the unusual circumstances upon which it relied to excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail in their contention that section 810(a) of the Conservation Act had been violated. Instead, the court found as follows:

> (1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence. Expedited exploration as a policy is stated in OCSLA. *See* 43 U.S.C. § 1332(3);
>
> (2) That exploration will not significantly restrict subsistence resources; and

(3) That the Secretary continues to possess power to control and shape the offshore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation.

The district court relied upon *Forelaws on Board v. Johnson,* 743 F.2d 677 (9th Cir. 1984) and *Alaska v. Andrus,* 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds as moot,* 439 U.S. 922 (1978). These cases do not support the district court's conclusion that these factors justify the denial of an injunction under the circumstances of this case. Notwithstanding a violation of the Environmental Act, this court refused to issue an injunction in a matter over which it had original jurisdiction because such relief would interfere with the operation of 20-year contracts, most of which were then in the third year of their term. *Forelaws on Board v. Johnson,* 743 F.2d at 685. Here, however, the injunction was sought *prior* to the sale of any leases in the outer continental shelf; therefore, the issuance of an injunction, at the time it was requested, would not have interfered with a long-term contractual relationship. The first well on Lease Sale 83 was not spudded until June 2, 1985. The Villages' consolidated requests for injunctive relief were denied on May 23, 1985. Had the district court issued a preliminary injunction when it was first requested, no leases would have been made until the requirements of the Conservation Act were met.

Alaska v. Andrus is factually distinguishable and contrary to the law of this circuit. First, the D.C. Circuit Court apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances. *See Thomas v. Peterson,* 753 F.2d at 764 ("absent 'unusual circumstances,' an injunction is the appropriate remedy for a violation of NEPA's procedural re-

quirements"); *Alpine Lakes Protection Society v. Schlapfer,* 518 F.2d 1089, 1090 (9th Cir. 1975) (the policies underlying an environmental protection statute (NEPA) "weight the scale in favor of those seeking the suspension of all action until the Act's requirements are met"). The Ninth Circuit rule was not discussed in *Alaska v. Andrus.* Instead, the D.C. Circuit followed a rule which restricts the availability of an injunction against an ongoing project to cases where it is necessary primarily "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA." *Alaska v. Andrus,* 580 F.2d at 485.

This court has found "unusual circumstances" in cases which have upheld the denial of a preliminary injunction to enjoin a project from proceeding in violation of an environmental protection statute where irreparable harm *to the environment* would result if such relief were granted. *Thomas v. Peterson,* 753 F.2d at 764 n.8. Similarly, in *Alpine Lakes Protection Society v. Schlapfer,* we denied a motion for an injunction pending appeal notwithstanding the presence of substantial questions concerning the Forest Service's compliance with the Environmental Act, because the issuance of an injunction against the use of a logging road would prevent the removal of diseased trees and permit the spread of insect infection throughout the adjacent national forest lands. 518 F.2d at 1090.

In *American Motorcyclist Ass'n v. Watt,* the plaintiffs filed an action to enjoin the Secretary's plan to conserve and protect the fragile resources in the California desert from recreational use. 714 F.2d at 963-64. The plaintiffs alleged that the plan would prevent traditional recreational vehicle use of the California desert and diminish the number of motorcyle events. *Id.* The district court expressly found that "there was a danger of harm to the fragile desert resources of the [California Desert Conservation Area] if the Plan's restrictions were lifted and plain-

tiffs were allowed to pursue increased motor vehicle use." *Id.* at 966. We upheld the denial of a preliminary injunction in *American Motorcyclist Ass'n v. Watt* in the face of a strong showing on the merits that the Secretary of the Interior had violated procedural provisions of the Environmental Act, because of the presence of unusual circumstances, i.e. the damage to fragile desert resources. *Id.* at 966-67. We discussed the impact of the exception to the rule set forth in *Alpine Lakes Protection Society v. Schlapfer,* requiring the issuance of a preliminary injunction upon a showing of a violation of the procedural prerequisites of an environmental statute, and explained: "*Alpine* thus authorizes the court not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government action allegedly in violation of NEPA might actually jeopardize natural resources." *American Motorcyclist Ass'n v. Watt,* 714 F.2d at 966.

In the matter before us the district court did not and could not make a finding that the issuance of a preliminary injunction preventing lease sales would endanger the subsistence uses and resources of the waters off the coast of Alaska. In fact, the Secretary's lease sale plan poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact section 810(a) of the Conservation Act. In *Gambell I,* we expressed this view as follows:

> When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. The Senate version of the Claims Act included provisions directing the Secretary to protect subsistence uses on public lands. The Conference Committee eliminated this provision, but the Committee made it clear that it did so only because it concluded

> subsistence resources should be protected by the Secretary of Interior through the exercise of existing administrative authority. The Committee wrote: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *See* H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. Title VIII of the Conservation Act was enacted because the Secretary and the state failed to heed Congress's admonition.

Gambell I, 746 F.2d at 580.

The record does not disclose any unusual circumstances which threaten the environment such as those which we recognized in *Alpine Lakes Protection Society v. Schlapfer* and *American Motorcylists Ass'n v. Watt*, which would justify denial of a preliminary injunction where there is a strong likelihood that the Villages will succeed in demonstrating that the Secretary has violated a statute directed at preserving or conserving the environment. On the contrary, the Secretary's leasing plan poses a threat to the preservation of the subsistence culture of Native Alaskans. Nor would the issuance of a preliminary injunction have interrupted the performance of long-term contracts as was the case in *Forelaws on Board v. Johnson*. We conclude, therefore, that the district court erred in finding that this is the type of rare or unusual case that justifies the denial of a preliminary injunction in the face of its conclusion that there is a strong likelihood of success on the merits.

D. *Public Interest*

As set forth above, the district court found that the public interest favored oil exploration in the outer con-

tinental shelf. This finding is not supported by a recitation of the facts relied upon by the district court that would demonstrate how the district court divined the public interest.

The Secretary correctly observes that the purpose of the 1978 amendments to the Lands Act was to expedite the

> exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade . . . .

43 U.S.C. § 1802 (as amended 1978).

The Secretary continues to ignore, however, the fact that section 810(a) of the Conservation Act was adopted by Congress "to benefit the Natives" and to be "consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses." *Gambell I,* 746 F.2d at 581 (*quoting* 126 Cong. Record 29,279 (1980)). As our highest court noted in a different context, "[t]he choice between these two policy arguments is not ours to make; it has already been made by Congress." *Secretary of Interior v. California,* 464 U.S. at 342.

Congress enacted section 810(a) in 1980 to protect the subsistence culture of Native Alaskans from exploration of the outer continental shelf that would impair their subsistence needs and uses. The Conservation Act defines subsistence uses as follows:

> [T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for

> personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (1982).

The maintenance of this subsistence economy is requisite to the literal survival of these isolated Alaskan tribal villages. On St. Lawrence Island alone, 80 percent of all food consumed annually comes from the sea and land. A substantial portion of their cash income comes from carved walrus ivory. Moreover, even if the community's physical survival is not placed in immediate jeopardy by disruptions from oil and gas exploration, the very social structure of the village is jeopardized. "A reduced availability of naturally recurring resources . . . alter[s] the depth, breadth and strength of the clans, *the organizational core of society*." Ronald L. Little and Lynn A. Robbins, Technical Report No. 89, *Effects of Renewable Resource Harvest Descriptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island,* at 304 (emphasis added). Subsistence is nothing less than "a symbolic and organizational base for their spiritual life." *Id.* at 360.

The district court's finding that the public interest favored oil exploration over the preservation of the subsistence culture of the Alaskan Natives violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans. The by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans. *Id.* at 330-374. This error of law compels reversal.[2]

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[2] Appellees rely on *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982) for the proposition that "[a] showing of threatened irreparable harm has always been the prime prerequisite for obtaining injunctive

E. *Retroactivity*

The Secretary and the Oil Companies argue that our decision in *Gambell I* may not be applied retroactively to Lease Sale 83. This contention was not raised in the district court. Ordinarily, we "will not . . . review an issue not raised below unless necessary to prevent manifest injustice." *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). However, we have the discretion to review issues raised for the first time on appeal "if it would not cause the parties to develop new facts." *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984). We will address the retroactivity issue because it does not involve a fact determination and because it is central to the case and important to the public. *Commodity Futures Trading Comm'n v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 581 (9th Cir. 1982).

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relief." Brief for the Federal Appellees p. 40. *Romero-Barcelo* is distinguishable from the matter before us in several important respects.

First, *Romero-Barcelo* did not involve the tension between the requirements of the Conservation Act and the Lands Act. Instead, the narrow question before the Court in *Romero-Barcelo* was stated as follows:

> The issue in this case is whether the Federal Water Pollution Control Act (FWPCA or Act), 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. IV), requires a district court to enjoin immediately all discharges of pollutants that do not comply with the Act's permit requirements or whether the district court retains discretion to order other relief to achieve compliance.

456 U.S. at 306-07. The Supreme Court observed that injunctive relief was not the only means of insuring compliance under the statute. The Court noted that "[t]he FWPCA itself, for example, provides for fines and criminal penalties. 33 U.S.C. §§ 1319(c) and (d)." *Id.* at 314. The Court construed the statute as permitting the district court "to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of im-

The Secretary and the Oil Companies rely primarily upon *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) to support their retroactivity argument. In *Chevron Oil Co.,*

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mediate cessation." *Id.* at 320. Unlike the FWPCA, the injunctive relief we grant is the only means of insuring compliance under section 810.

In *Romero-Barcelo,* the Supreme Court contrasted the requirements imposed by Congress in the FWPCA with its construction of the Endangered Species Act (87 Stat. 884, 16 U.S.C. § 1531 *et seq.*) in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). In *TVA v. Hill,* the Supreme Court held that an imminent violation of the Endangered Species Act required injunctive relief. *Id.* at 172-73. In *Romero-Barcelo,* the Court summarized its holding in *TVA v. Hill* as follows:

> Refusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.' 437 U.S., at 173. Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate *the objectives of the Act.*

Romero-Barcelo, 456 U.S. at 314 (emphasis added).

It appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration. Thus, only the issuance of a preliminary injunction to compel compliance with the requirements of section 810 can uphold Congressional intent. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill,* 437 U.S. at 194.

Secondly, *Romero-Barcelo* is not dispositive because in that matter the district court denied injunctive relief after a trial on the merits of the complaint for injunctive relief. This matter is before us on an interlocutory appeal. We do not know what evidence will be developed at trial. In the absence of a fully developed trial record, we cannot now decide whether a permanent injunction should issue in this matter. The fact, as noted by our dissenting colleague, that this court may visit this case again should not cause us to issue an advisory opinion or attempt to usurp the function of the district court. Congress has determined that interlocutory review is available to persons seeking review of an order granting or refusing an injunction. 28 U.S.C. § 1292(a)(1). The plaintiffs in this matter have properly exercised their rights.

the Supreme Court set forth the following test for determining whether to apply a court decision retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation omitted], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, [citation omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' [citation omitted].

404 U.S. at 106-07.

Applying the *Chevron* factors, we are persuaded that our decision in *Gambell I* should be applied retroactively. Although *Gambell I* established a new principle of law in construing section 810(a) of the Conservation Act as applicable to the outer continental shelf, our review of the prior history of section 810(a) of the Conservation Act and its stated purpose satisfies us that retroactive application of *Gambell I* would further the operation of a statute enacted by Congress expressly to protect subsistence uses and resources from any harmful effects resulting from oil exploration. No substantial inequitable results would occur from retroactive application. *See Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 563 (9th Cir. 1984) (a decision should not be applied retroactively if it would produce substantial inequitable results). The facts

would produce substantial inequitable results). The facts demonstrate unequivocally that the Secretary conducted Lease Sale 83 with knowledge that his right to do so without complying with the Conservation Act was in doubt in light of the fact that an appeal was then pending on Lease Sale 57. Any financial losses which may have been incurred by the Oil Companies were also incurred with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending before the court. Under the *Chevron* test, retroactive application of our prior decision in *Gambell I* is proper.

E. *Laches*

The Secretary and the Oil Companies assert that the Villages' motion for a preliminary injunction of exploratory activities on Lease Sale 83 is barred by laches. This contention is predicated on the fact that this action to enjoin Lease Sale 83 was filed on April 25, 1985, more than one year after the notice of sale was published on April 17, 1984.

We agree with the Villages that the district court properly rejected the laches claim. In order to prevail on this equitable defense, the Secretary and the Oil Companies must have demonstrated that the Villages unreasonably delayed in asserting a known legal right and that this delay caused the Secretary and the Oil Companies prejudice. *See Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 779 (9th Cir. 1980). We review the district court's ruling concerning the defense of laches for an abuse of discretion. *Id.*

We conclude that the Villages' delay was reasonable for the following reasons:

> (1) On March 4, 1983, more than one year before the sale was held, the Village of Gambell gave the Secretary notice that it believed that section 810 of the

Conservation Act applied to leases of public lands in the outer continental shelf by filing a claim for injunctive relief concerning Lease Sale 57.

(2) On April 17, 1984, Lease Sale 83 was held.

(3) On November 24, 1984, we issued our decision in *Gambell I* wherein we held that section 810 of the Conservation Act applied to leases in the outer continental shelf. *Gambell I*, 746 F.2d at 582. On May 10, 1983, prior to Lease Sale 83, a motions panel of this court had held that there was insufficient reason to enjoin lease sales in the outer continental shelf pending appeal of the denial of the preliminary injunction requested to prevent Lease Sale 57.

(4) Thus, a challenge to Lease Sale 83 would have been useless.

Under these circumstances, the district court did not abuse its discretion in holding that the delay was reasonable and did not cause the Secretary or the Oil Companies any prejudice which was not the result of a calculated risk.

CONCLUSION

The Secretary failed to evaluate the effect on subsistence uses and needs of the Alaskan Natives prior to Lease Sale 57 and Lease Sale 83 because of his belief that section 810(a) of the Conservation Act did not apply to the outer continental shelf. For purposes of reviewing the denial of a preliminary injunction, we conclude that the district court correctly determined that there was a strong likelihood that the Villages would succeed in their claim that the Secretary failed to comply with section 810 of the Conservation Act.

The district court erred as a matter of law in concluding that these facts presented rare or unusual circumstances justifying a failure to follow the rule that a preliminary injunction should issue where a federal agency has violated

the procedural requirements of an environmental protection or conservation statute. Under these facts, the issuance of a preliminary injunction would not have resulted in a belated interruption of long term contracts or interfered with any plan to *preserve* subsistence uses or to *protect* the environment. Instead, the Secretary's plan involves exploitation of finite environmental resources and a potential threat to the subsistence culture of Alaskan Natives.

The Conservation Act was amended in 1980 for the express purpose of compelling the Secretary to consider subsistence uses and needs in exploring and developing our oil resources in the public lands beneath the outer continental shelf. The public interest as expressed by Congress in the 1980 amendments to the Conservation Act requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must prevail over our possible energy needs. Thus, the denial of a preliminary injunction was error because the court misapplied the law of the circuit concerning the "unusual circumstances" exception and failed to honor the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.

The district court is directed to enter a preliminary injunction enjoining all activities in connection with Lease Sale 57 and Lease Sale 83 pending its determination of the consolidated claims for injunctive relief and pending resolution of the issues which it must address pursuant to the instructions of this court in *Gambell I*.

In accordance with the stipulation of the parties, the hold harmless agreement will terminate as of the date that the Oil Companies inform this court that their 1985 drilling operation in Lease Sale 57 and Lease Sale 83 have terminated and that all drilling rigs and support craft have vacated the area.

Reversed and Remanded.

PEOPLE OF THE VILLAGE OF GAMBELL

v.

HODEL

No. 85-3877

DIMMICK, J. (dissenting)—This is the second time this court has punted to the trial court. In the first appeal, *Village of Gambell v. Clark,* 746 F.2d 572 (9th Cir. 1984) ("*Gambell I*") it was clear that the Secretary of Interior had violated an environmental statute by not complying with section 810 of the Alaska National Interest Lands Conservation Act (ANILCA). The court, however, did not direct the trial court to enter an injunction. Instead, the only guidance it gave to the trial court was for it to determine "the proper remedy." *Id.* at 573. The trial court determined that, at this time, a proper remedy does not include a preliminary injunction.

The majority now tells the trial court, on the same facts available in *Gambell I,* that the trial court erred and that it must enter a preliminary injunction. Nevertheless, the majority does not tell the trial court whether a permanent injunction must be issued, or whether post-sale compliance with section 810 is acceptable. Thus, this case will probably become a trilogy.

Our review of the trial court's decision denying the preliminary injunction is limited. *Apple Computer, Inc. v. Formula International, Inc.,* 725 F.2d 521 (9th Cir. 1984). The trial court's decision to grant or deny an injunction is discretionary and will be reversed only if based on erroneous legal standards or clearly erroneous findings of fact. *Sports Form, Inc. v. United Press International,* 686 F.2d 750 (9th Cir. 1982). I find that the trial court used the correct legal standard and that its findings of fact are supported by the record. Thus, I would affirm its discretionary decision to deny the preliminary injunction. I would also not apply *Gambell I* retroactively to Lease No. 83.

I.

The trial court found that while appellants were likely to succeed on the merits the balancing of the irreparable harms favored appellees, not appellants. It accordingly refused to issue a preliminary injunction.

The majority, in reversing the trial court's decision, advances a new rule: absent unusual circumstances, an injunction must be issued when an environmental statute has been violated.[1] The Supreme Court, however, has rejected such a rigid approach to the issuance of an injunction. In *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), the Navy had violated the provisions of an environmental statute—the federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 (1982). The district court refused to enter an injunction pending compliance. The Court of Appeals for the First Circuit reversed holding that the district court was required to enter an injunction. *Romero-Barcelo v. Brown,* 643 F.2d 835 (1st Cir. 1981). The First Circuit stated that "regardless of the district court's finding that the Navy's dropping of ordinance caused no significant harm to the environment, it erred in failing to consider the judiciary's 'responsibility to protect the integrity of the . . . process mandated by Congress . . . .' " *Id.* at 861 (citations omitted). The Supreme Court reversed. The Court noted that the equitable remedy of an injunction requires flexibility and the exercise of discretion and that it should only be entered to protect a party from irreparable harm. *Weinberger v. Romero-Barcelo, supra* at 312. The majority does not include this case in its analysis of when an injunction should be issued for the

[1] The majority promulgates this rule as if it were well settled. That is not the case. If it were this court in *Gambell I* would have directed the trial court to enter an injunction since it was evident at that time that an environmental statute had been violated and that no unusual circumstances existed.

violation of an environmental statute. (See Majority Opinion, section C.) In my opinion it is binding precedent.

While there is a presumption that irreparable harm flows from a violation of an environmental statute, *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), such a presumption is not irrebuttable. A party opposing the issuance of an injunction may present evidence showing that no irreparable harm will occur. Appellees have done exactly that. Appellees presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources. In addition, appellees presented evidence which showed that they would have suffered irreparable harm if a preliminary injunction had been issued. At the time the district court was deciding whether to enter a preliminary injunction, Exxon, Amoco, and ARCO had committed almost $70 million in support of their plans to explore Lease Tracts Nos. 57 and 83 during the summer of 1985. If the trial court had enjoined their exploration activities their money would have been lost. The permanent loss of $70 million constitutes substantial irreparable harm. In contrast, the appellants advanced two arguments to support the presumption of irreparable harm: (1) the danger of bureaucratic commitment and (2) speculative harm to the environment. The record amply supports the trial court's conclusion that appellants would not suffer any significant harm.[2] Thus, appellees successfully rebutted the presumption which favored appellants. Accordingly, the trial court did not err in refusing to grant the injunction.

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[2] The majority fails to specify what irreparable harms appellants will suffer and I fail to find any.

II.

The Lease No. 83 sales were conducted six and one-half months before this court filed its decision in *Gambell I*. Appellants, who were aware of Lease Sale No. 83, did not file a suit advancing the ANILCA claim as they had done in Lease No. 57. Moreover, they did not challenge Exxon's, ARCO's or Amoco's plans of exploration which were approved by the Department of Interior. Relying on these approvals, Exxon, ARCO, and Amoco committed over $60 million preparing for the 1985 drilling season. It was not until April 22, 1985, a full year after the lease sales were conducted and five months after *Gambell I* was decided that appellants filed a complaint arguing that Lease Sale No. 83 should also be voided.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court set forth three factors to be used for determining whether to apply a court decision retroactively.[3] The majority concedes that *Gambell I* established a new principle of law. This weighs in favor of not applying *Gambell I* to Lease No. 83. I disagree, however, with the majority's conclusions as to the other two factors.

The majority concludes, without providing an adequate explanation, that the retroactive application of *Gambell I* would further the operation of the statute. Contrary to the majority's assertion, the trial court specifically found that there is no reason to believe that any aspect of Sale No. 83 will restrict subsistence uses. Moreover, retroactive application of *Gambell I* is unnecessary to achieve the statute's goals. Instead, those goals can be fully realized by a declaration that ANILCA evaluations must be published for future Alaska OCS sales and that the evaluations must

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[3] The three factors are: (1) does the decision establish a new principle of law; (2) will retroactive application of the decision further or retard its application; and (3) is it equitable to apply the decision retroactively. *Chevron Oil Co.* v. *Huson*, 409 [*sic*] U.S. 97, 106-107 (1971).

be prepared for the exploration and development/production plans of all prior sales.

Applying the third factor, the majority finds that no substantial inequitable results would follow from retroactive application. The majority views any financial loss which the appellees may have suffered as a calculated risk on their part because an appeal was pending in this court on Lease No. 57. I do not agree. As noted earlier, appellants did not object to Lease Sale No. 83. Nor did they file any objections to the plans of exploration which were approved. When the oil companies made their expenditures they were relying on a valid court judgment and relying on approved plans of exploration. To hold that those oil companies were taking a "risk" is an unfair characterization of the circumstances. To now apply a new legal principle which is unnecessary to advance the goals of a statute defies the concept of fair play.

III.

I believe this court, as in *Gambell I,* is not giving the trial court adequate guidance. In footnote 2 of its opinion, the majority states that "[i]n the absence of a fully developed trial record, we cannot now decide whether a permanent injunction should issue in this matter." Such a statement leads me to ask: What additional facts are necessary? Can the appellants produce any additional evidence that will be relevant to the decision whether a permanent injunction should be issued? I think not. The majority holds that a violation of environmental statute, absent exceptional circumstances, requires that an injunction be issued. The majority finds that no exceptional circumstances exist here and that the Secretary of Interior has violated an environmental statute. Therefore, under

the majority's holding, a permanent injunction must be issued.[4]

This court should also tell the trial court what will constitute acceptable compliance. That is, will a section 810 analysis performed *after* a lease sale satisfy the statute's requirements? This issue is critical because the Department of Interior complied with the requirements of section 810 but did so after the lease sale.[5] If a post-sale section 810 analysis will not satisfy the statute's requirements, the sales of Leases Nos. 57 and 83 must be voided. If a post-sale section 810 analysis is satisfactory, then the majority should clearly state this. Then the trial court, on remand, could determine whether the two studies done after the sale are adequate. Such a holding would not require that post-sale compliance would always be satisfactory. Under the circumstances of this case, however, allowing post-sale compliance may well be appropriate. In future lease sales, post-sale analysis may not be satisfactory since the Department of Interior now has notice that it must comply with section 810 before such sales.

The majority fails to address this issue. Consequently, the trial court will be forced once again, as it was after *Gambell I*, to decide a question of law. The losing party

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[4] The majority states that if it were to decide this issue it would be usurping the function of the district court. I cannot agree that providing the trial court with adequate guidance as to the proper application of the law can ever be characterized as usurping its function.

[5] Less than six months after *Gambell I* was decided, the Department of Interior performed a section 810 analysis for Lease No. 57 finding that the sale would not significantly restrict subsistence uses. Less than one month after *Gambell I*, the Department performed an OCS Environmental Assessment which included a section 810 analysis for Exxon's, ARCO's, and Amoco's plans of exploration for tracts in Lease No. 83. In that assessment, the Department of Interior found that the exploration proposals of the three oil companies would not significantly restrict subsistence uses.

will appeal which will result in more delay and uncertainty as to the parties' rights. Because this issue has not been resolved, we will, in all probability, see *Gambell III* before Rambo III. I therefore dissent, respectfully.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

A85-184 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR, DEFENDANTS,

ARCO ALASKA, INC., ET AL., INTERVENORS-DEFENDANTS.

No. A85-201 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE U.S. DEPARTMENT OF THE INTERIOR, DEFENDANTS,

AMOCO PRODUCTION COMPANY, ET AL., INTERVENORS-DEFENDANTS.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on plaintiffs' motions for preliminary injunction. In these motions plain-

tiffs allege that the Secretary violated § 810 of ANILCA in approving Lease Sale 57 in Norton Sound and Lease Sale 83 in the Navarin Basin. For the reasons stated below, the court finds that a violation of ANILCA occurred in each case, but that an injunction is not the appropriate form of relief. As a preliminary matter, intervenor-defendants' request for oral argument is denied to expedite the business of the court. Local Rule 5(C)(1).

The Ninth Circuit recognizes two sets of standards for evaluating claims to injunctive relief, which it has termed the "traditional" and the "alternative" tests. The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?

The "alternative test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983).

I. *Initial Matters*

The court finds it has jurisdiction over the above actions. The provisions of 43 U.S.C. § 1349(c)(1) and (2) do not apply for the reason stated in *People of the State of California v. Andrus,* 608 F.2d 1247, 1248-49 (9th Cir. 1979). The court also finds that laches is not applicable in that plaintiffs were reasonably diligent in bringing these actions. Finally, contrary to plaintiffs' assertions, the court finds that the Ninth Circuit did not reach the merits of whether an ANILCA violation occurred in Lease Sale 57. *See People of the Village of Gambell v. Clark,* 746 F.2d 572, 582-83 (9th Cir. 1984).

II. *ANILCA's Substantive Effect*

Plaintiffs argue that Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111-3126, (ANILCA) contains substantive requirements that the Secretary must follow in lease sale tract selection. However, Congress designed ANILCA § 810 as a procedural statute. ANILCA § 810(d), 16 U.S.C. § 3120(d); *Gambell,* 746 F.2d at 582. Once the Secretary has complied with its procedural requirements, substantive decisions will not be set aside unless they are clearly arbitrary and capricious. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971); *Latham v. Brinegar,* 506 F.2d 677, 692-93 (9th Cir. 1974). There simply is no requirement that the Secretary must "limit his tract selection to those tracts with the highest oil and gas potential."

III. *ANILCA § 810: The Initial Review Procedure*

For all leases, § 810 requires the federal agency involved to evaluate (1) the effect of leases on subsistence uses and needs; (2) the availability of other lands for oil and gas leasing; and (3) other alternatives which would reduce or eliminate the effect on subsistence. *Kunaknana v. Clark,* 742 F.2d 1145, 1150-51 (9th Cir. 1984). The Secretary did make such a review here. The effect of the leases on subsistence and alternatives which would reduce or eliminate the impact on subsistence were discussed at some length in the respective EIS's for the lease sales. The availability of other lands was discussed in the context of the EIS for the Secretary's Five Year leasing plan. *See* Intervenor-Defendants' Exs. B & C, Docket #90, A85-184. Nevertheless, since the Secretary violated ANILCA for the reason cited below, the court does not decide today whether this discussion is sufficient under ANILCA.

The Secretary, however, assumed that ANILCA did not apply to Outer Continental Shelf (OCS) lands when he performed the above evaluations. Consequently, he did not have the policy precepts of ANILCA in mind at the

time of evaluation. The court finds that the Secretary cannot comply with ANILCA unless he evaluates the subsistence impacts of the leases with the mandate of ANILCA clearly in mind. *See Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982); *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 445 (9th Cir. 1976).

Congress, in enacting ANILCA, determined that previous environmental statutes and the executive branch were not providing sufficient protection for Native Alaskans' subsistence needs. *See Gambell,* 746 F.2d at 580. Title VIII of ANILCA was passed to remedy that lack of protection. It contains strong findings and policy statements favoring subsistence. ANILCA §§ 801, 802. In addition, Congress required that subsistence be considered prior to any public land disposition. *Id.* § 810; *See* S. Rep. No. 96-413, 96th Cong., 1st Sess. 234 (1979)(requirements of § 810 must be incorporated into land use planning process). This court must assume that, in passing Title VIII, Congress intended to alter the manner in which public decisions regarding land dispositions occurred. To assume otherwise would be to assume Congress intended a useless act. *See, e.g., Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977). Since the Secretary did not have the mandate of ANILCA clearly in mind, as was the case here, he could not have performed the lease sale evaluations in the manner Congress intended.

IV. *Findings of No Significant Restriction*

Plaintiffs also allege that the Secretary violated ANILCA in failing to follow the notice, hearing, and finding requirements of § 810(a)(1)-(3). Those requirements must be followed whenever the agency concludes that the proposed action "may significantly restrict subsistence uses." *Kunaknana,* 742 F.2d at 1151. The defendants argue that the lease sales did not significantly restrict subsistence in that the actions would cause no or only "slight" disruptions in user resources or access to resources. *See id.*

Defendants and defendant-intervenors further argue that the Secretary does not need to consider the impact of the lease's development and production phases in making this determination. The Ninth Circuit has held otherwise. In *Kunaknana* it stated:

> [8] We find that the agency examined the relevant factors and did not err in its judgment. The district court's decision includes findings of fact which evidence an articulated rational connection between the facts found [by the agency] and the choice made. *Id. See* CR 111 (Decision of Record). *The agency's decision-making process included the cumulative impacts of both the entire expedited leasing program and Lease Sale 831. This is evidenced by the fact that the agency removed certain lands, such as Caribou calving areas and Black Brant molting areas, from potential leasing and included stipulations regarding subsistence use in the leases.* The agency imposed these protective lease conditions and stipulations in order to preclude *future* restrictions on subsistence uses that might be caused by activity permitted by the NPRA-A leasing program.

Id. (emphasis added). Implicit in the above passage is the holding that ANILCA requires consideration of the "entire . . . leasing program," including development, at the lease stage.

In order to assure that procedural environmental statutes are implemented to the fullest extent possible, it is important that all environmental consequences be considered as early in the process as is meaningfully possible. *See Village of False Pass v. Watt,* 565 F. Supp. 1123, 1135-36, 1145 (D. Alaska 1983), *aff'd,* 733 F.2d 605 (9th Cir. 1984). As the court stated there:

> I note, however, that consideration at the leasing stage of potential or anticipated environmental consequences relating to exploration, development and

> production activities serves a number of important objectives. The inclusion into a leasing stage environmental impact statement of known environmental information relating to later exploration or development activities which may in some way bear significant relationship to the leasing decision or to the preliminary activities serves to alert the Secretary to any environmental consequences which may be irreversible. Information relating to potential or anticipated environmental consequences may also focus on the need to develop further information necessary for adequate discussion and consideration in an exploration or development and production environmental impact statement. Finally, the legislative scheme providing for several administrative decisions along the progression from leasing through production should not unnecessarily weaken the legislative objectives underlying the National Environmental Policy Act, the Endangered Species Act, the Marine Mammal Protection Act, or other acts serving to protect the environment. On the other hand, although known environmental consequences relating to a later stage ought to be included in a leasing stage environmental impact statement, it is not necessary to include information about environmental consequences which are conjectural or speculative, and will remain so until exploration or development.

Id. at 1145. *Accord. North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980). ANILCA, like the Endangered Species Act and NEPA, therefore requires that development and production impacts be addressed at the lease stage. To segment the lease sale process, as defendants suggest, would thus run counter to the process required for effective environmental review. *See also Thomas v. Peterson*, 753 F.2d 754, 759-60 (9th Cir. 1975) (requiring early consideration of environmental impacts in

multi-phase project); *Village of False Pass v. Watt*, 733 F.2d 605, 608-09 (9th Cir. 1984) (ESA applies at lease stage).

Secretary of the Interior v. California, 104 S. Ct. 656 (1984), does not counsel to the contrary. The Supreme Court in that case ultimately depended on the unique statutory language and legislative history of OCSLA and the CZMA. Given that the court held that the ESA and NEPA continued to apply at the lease stage, it is probable that the court's holding was limited to the issue before it. *Id.* at 670. *See also* 43 U.S.C. § 1346(a), (d) (requiring study of environmental impacts prior to leasing).

A. *Lease Sale 57*

In preparation for this litigation, the Minerals Management Service prepared an ANILCA § 810 "signjficant restriction" study. In this study, the MMS found that the lease and exploration stages will not significantly restrict subsistence, but the development and production "may significantly restrict subsistence uses in certain areas" if oil is discovered. *See* Def. Ex. A at 3. Given that the agency found a significant restriction on subsistence may occur, the notice, hearing and findings requirement of § 810(a)(1)-(3) are triggered. The failure of the agency to follow those procedures is a violation of ANILCA. *See* 5 U.S.C. § 706(2)(A) & (D).

B. *Lease Sale 83*

In the FEIS prepared for Sale 83, the Secretary specifically found that for the lease sale, including development and production, "[i]mpacts on subsistence patterns from the proposal are negligible to nonexistent." FEIS at IV-84. Plaintiffs challenge this finding on the grounds that this conclusion is inconsistent with other findings in the FEIS and Secretarial Issue Document (SID). Elsewhere, the FEIS states:

> Pinnipeds breeding, migrating, and molting in the lease area when ice is present could experience

> substantial losses from oilspills or disturbance. Walrus, and perhaps ribbon seals could experience moderate regional effect. . . .

Id. at IV-42. The FEIS also noted that under a worst case analysis, "one third of the entire bowhead whale population could be exposed to adverse effects." *Id.* at IV-65.

The conclusion of no significant restriction, in face of the above findings, is not arbitrary and capricious. *See Kunaknana,* 742 F.2d at 1151 (stating standard of review).[1] The worst case analysis is speculative, and given the continuing requirements of the Endangered Species Act and Secretarial control over leasing, highly unlikely to occur. Any "moderate" effect on the walrus population is equally unlikely to effect subsistence, given the current abundance of the species. FEIS at IV-83. The court finds the Secretary considered the relevant factors and there was not a clear error of judgment.

V. *Appropriate Remedy*

Absent unusual circumstances, an injunction is the appropriate remedy for the violation of a procedural environmental statute, such as ANILCA § 810. *Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985). Irreparable harm is presumed to flow to plaintiff by reasons of the violation. *Id.; Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). Nevertheless, in unusual circumstances, an injunction may be inappropriate. *Forelaws on Board v. Johnson,* 743 F.2d 677, 686 (9th Cir. 1984); *State of Alaska v. Andrus,* 580 F.2d 465, 485-87 (D.C. Cir. 1978).

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[1] Plaintiffs' do not argue here that the Secretary's determination of "significant restriction" should be reviewed under the "rule of reason" and accordingly this court, like the *Kunaknana* court, does not reach the issue of whether arbitrary and capricious or the "rule of reason" is the correct standard of review. *Cf. Foundation for North American Wild Sheep v. United States Dept. of Agriculture,* 681 F.2d 1172, 1177 n.24 (1982) (applying "rule of reason" under NEPA).

The Court finds in the instant case:

(1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence. Expedited exploration as a policy is stated in OCSLA. *See* 43 U.S.C. § 1332(3);

(2) That exploration will not significantly restrict subsistence resources; and

(3) That the Secretary continues to possess power to control and shape the off-shore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation.

Applying the traditional test for preliminary injunction the court finds:

(1) Movants have established a strong likelihood of success on the merits;

(2) The balance of irreparable harm does *not* favor the movants;

(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.

Based on the above the court finds an injunction preventing oil exploration is inappropriate under the facts of this case.

Accordingly, IT IS ORDERED:

THAT plaintiffs' motion for preliminary injunction is denied.

DATED at Anchorage, Alaska, this 23rd day of May, 1985.

BY ORDER OF THE COURT:

JAMES A. VON DER HEYDT
UNITED STATES DISTRICT JUDGE

Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 83-3735X
83-3781
D.C. No. 83-003

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS-APPELLANTS,

v.

WILLIAM CLARK*, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR, DEFENDANTS-APPELLEES.

AND ARCO ALASKA, INC., ET AL., DEFENDANTS-APPELLEES.

OPINION

Appeal from the United States District Court for the District of Alaska James A. von der Heydt, District Judge, Presiding Argued and Submitted October 7, 1983

Before: BROWNING, Chief Judge, HUG, Circuit Judge, and REED**, District Judge.

BROWNING, Chief Judge:

The appellee Secretary of Interior offered to sell leases for about 2.4 million acres of land in the Norton Sound

*William Clark is substituted for James G. Watt as Secretary of the Interior pursuant to Fed. R. App. P. 43(c).

**Honorable Edward C. Reed, Jr., United States District Judge, District of Nevada, sitting by designation.

Basin off the western shore of Alaska for oil and gas exploration under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356. Appellee oil companies submitted bids for these leases. Appellants, the People of the Village of Gambell and the People of the Village of Stebbins (Alaska Native Indian Reorganization Act Associations composed of residents of two towns on Norton Sound) brought this action to enjoin the sale. The district court denied appellants' motion for preliminary injunction and granted the Secretary's motion for summary judgment. This appeal followed.

Appellants argue that oil and gas development without their consent is barred because it will adversely affect their aboriginal right to subsistence hunting and fishing. Alternatively, they contend the lease sale failed to satisfy the procedural requirements of section 810 of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3120, providing special protections for subsistence uses in Alaska.

The district court held that neither appellants' aboriginal hunting and fishing right nor section 810 of the Conservation Act extend to waters over the outer continental shelf outside the territorial boundaries of the State of Alaska.

We hold that if appellants had an exclusive aboriginal right to hunt and fish in offshore areas adjacent to Alaska, that right was extinguished by the Alaska Native Claims Settlement Act (Claims Settlement Act), 43 U.S.C. §§ 1601-1628.[1] We further hold, however, that section 810

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[1] We assume rather than deciding that appellants had an aboriginal right to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale. Since we conclude any such rights were extinguished by the Claims Settlement Act, we also do not decide whether they would be extinguished by the Outer Continental Shelf Lands Act as well.

of the Conservation Act does apply to outer continental shelf waters in Norton Sound, and remand to the district court for determination of the proper remedy.

I.

Appellants argue that oil and gas exploration and development in Norton Sound conflicts with their asserted aboriginal right to hunt and fish in these waters and concomitant right to the minerals of the outer continental shelf underlying the Sound.

Aboriginal title or right is a right of exclusive use and occupancy held by Natives in lands and waters used by them and their ancestors prior to the assertion of sovereignty over such areas by the United States. These rights are superior to those of third parties, including the states, but are subject to the paramount powers of Congress. *See Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 667-69 (1974); *United States* v. *Santa Fe Pacific R.R.,* 314 U.S. 339, 345 (1941). Aboriginal rights based on occupation and use are entitled to the protection of federal law even when they are not formally recognized as ownership by treaty or statute, *Santa Fe,* 314 U.S. at 347, but such unrecognized aboriginal rights can be extinguished by Congress without compensation. *See Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279-85, 288-89 (1955); *United States* v. *Dann,* 706 F.2d 919, 922 n.1 (9th Cir. 1983), *cert. granted,* ____ U.S. ____, 104 S. Ct. 2693 (1984); *Wahkiakum Band v. Bateman,* 655 F.2d 176, 180 (9th Cir. 1981); *United States* v. *Atlantic Richfield Co.,* 612 F.2d 1132, 1134 (9th Cir. 1980). Congress's intention to extinguish must be clear; it will not be lightly implied. *See United States* v. *Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 354 (1941); *United States* v. *Dann,* 706 F.2d at 928-29; *United States* v. *Gemmill,* 535 F.2d 1145, 1147 (9th Cir. 1976).

Appellees argue the Claims Settlement Act extinguished whatever aboriginal rights the Natives may have held in Norton Sound. The Claims Settlement Act arose out of a series of events beginning with passage of the Alaska Statehood Act in 1958. When Alaska became a state, nearly all its territory was federal land. The Statehood Act granted the new state the right to select over 100 million acres for state ownership. However, the state agreed by section 4 of the act to "disclaim all right and title . . . to any lands or other property (including fishing rights) [of Alaska Natives]. . . ." Pub. L. 85-508, 72 Stat. 339, 339 (1958). The state selected large areas of federal land and made application for patents for the land. The Natives claimed aboriginal title to much of the same territory. The discovery of oil on the North Slope in the 1960's exacerbated this conflict. These conflicting claims hindered both development and protection of Native and national interests in Alaska. In 1966 Secretary of Interior Stewart Udall "froze" all public land transactions in Alaska pending resolution of the conflicting claims. In 1971 Congress passed the Claims Settlement Act in an effort to accommodate in a rational manner the interests of the state, Native groups, conservationists, and potential developers, including the oil companies. *See generally,* H.R. Rep. No. 1045, 95th Cong., 2d Sess., pt. I at 188-89 (1978); S. Rep. No. 405, 92d Cong., 1st Sess., pt. I at 71-78 (1971).

The heart of the Claims Settlement Act was the extinguishment of Native claims based on aboriginal right in return for a grant to the Natives of $962,500,000 and 40,000,000 acres of land. *United States* v. *Atlantic Richfield,* 612 F.2d 1132, 1134 (9th Cir. 1980). Unquestionably it was the purpose of the Claims Settlement Act to extinguish the aboriginal claims of Alaska Natives.[2] The

[2] "Native" is defined in the Act as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof." 43 U.S.C. § 1602(b).

question is whether the extinguishment provision applies to lands on the outer continental shelf adjacent to the Alaskan land mass and to waters over such lands.

Our inquiry begins with the statutory language. The critical language is found in Section 4(b) of the Act, 43 U.S.C. § 1603(b):

> All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished. (emphasis added).

The statute also states: "there is an immediate need for a fair and just settlement of all claims by Natives . . . based on aboriginal land claims," and "the settlement should be accomplished rapidly, with certainty, [and] . . . without litigation. . . ." 43 U.S.C. § 1601(a), (b).

The argument that aboriginal title in outer continental shelf lands and waters is not extinguished rests entirely upon use in section 4(b) of the phrase "in Alaska" to identify the location of the titles and claims of title to be extinguished.

We believe Congress used the phrase "in Alaska" in this context to mean the geographic region, including the contiguous continental shelf and the waters above it, and not merely the area within the strict legal boundaries of the State of Alaska. This is not an uncommon usage. Indeed, the Norton Sound, at issue here, is described in *Webster's New Geographical Dictionary* (1972 ed.) as a "large inlet of NE Bering Sea, *in W Alaska*. . . ." (emphasis added). As indicated in Part II of this opinion, nine years later, when Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (Conservation Act), to complete the land allocation process initiated by the Statehood and Claims Settlement Acts, Congress used the words "in Alaska" to refer to areas of the

outer continental shelf. Section 1001 of the Conservation Act, 16 U.S.C. § 3141, refers to "all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska. . . ." During debates on the Conservation Act, the phrase "in Alaska" was used on numerous occasions to include the outer continental shelf. *See e.g.*, 125 Cong. Rec. 9900, 11,128 (1979) (statements of Rep. Udall); *id.* at 9907 (statement of Rep. Young).

The possibility of two meanings of the phrase "in Alaska" renders the provision ambiguous, justifying reference to the legislative history. That history makes it clear that Congress intended to extinguish aboriginal fishing and hunting rights in outer continental shelf waters contiguous to the State of Alaska.

Congress repeatedly enjoined those who were to implement the statute to interpret the extinguishment section broadly to accomplish a complete and final settlement of aboriginal claims and avoid further litigation of such claims.[3] Claims of aboriginal title to submerged lands,

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[3] Relevant statements from the legislative history are quoted in *United States* v. *Atlantic Richfield Co.*, 612 F.2d 1132, 1136 (9th Cir. 1980):

The House report stated,

> Section 4 extinguishes all aboriginal titles in Alaska, and all claims based thereon,

and

> The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title.

H.R. Rep. No. 523, 92d Cong., 1st Sess. 6, 8 *reprinted in* [1971] U.S. Code Cong. & Ad. News 2196, 2198. The Senate report stated that the objective of the legislation was to avoid

> a myriad of lawsuits which cannot provide justice to any of the parties involved but which may be expected to increase the existing antagonisms between Native people and other Alaskans.

both inland and offshore, were expressiy included in the extinguishment provision, as were "any aboriginal hunting or fishing rights." The needs of the Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives, *see, e.g.*, H.R. Rep. No. 523, 92nd Cong., 1st Sess. 5, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2192, 2195; the land was granted, in part, "in lieu of subsistence hunting and fishing rights," 117 Cong. Rec. 36864 (1971) (Rep. McClure).[4]

S. Rep. No. 405, 92d Cong., 1st Sess. 73 (1971). The Conference Committee report[7] stated,

> It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

Conf. Rep. No. 40, *reprinted in* [1971] U.S. Code Cong. & Ad. News 2253 (emphasis in original).

The statements of former Justice Arthur Goldberg, attorney for the Alaska Federation of Natives, before Congress in 1969 also support the district court's conclusion. Goldberg, under questioning by Senator Stevens of Alaska, said, "The position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 300-01 (1969).

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[7] The House and Senate Conference Reports are identical. S. Conf. Rep. No. 481, 92d Cong., 1st Sess. (1971); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. (1971) [Hereinafter cited as Conf. Rep.]

[4] Rep. McClure, a member of the Committee on Interior and Insular Affairs, stated:

> . . . The settlement of this acreage of land is in lieu of other rights, and the bill in specific terms removes hunting and fishing rights. The subsistence lands that may be selected, after the

Appellants' claim of aboriginal title rests upon immemorial use for hunting and fishing extending far to sea. They assert:

> Factually, no aboriginal group has ever used water and ice as intensely as have the Eskimos. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, and during this period the Eskimos treat the ice as a mere extension of the land. They set up camps on the ice. They build roads on it. And, most importantly, they hunt and fish on it. R. Nelson, *Hunters of the Northern Ice* (1969). . . . Eskimos have relied on the sea to provide them with most of their necessities. They have relied on the oceans to provide them with food, clothing, fuel, and the basic material for making hunting equipment such as kayaks and harpoons. *Id.*; N. Chance, *The Eskimo of North Alaska* 9 (1966).
>
> Because ice areas are not physically different from land during long periods of the year, and because Eskimos have generally relied on the oceans for most of their food, fuel, and clothing, they have not tradi-

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village lands are selected and after the statehood lands are selected, are in lieu of subsistence hunting and fishing rights, and the only hunting and fishing rights they will have are in connection with whatever lands are selected by them under the provisions of the bill.

* * *

. . . The rights for hunting and fishing will be not rights, but whatever is granted to them as a matter of charity or a matter of generosity on the part of the State or the Federal Government. I think we should know that is one of the reasons why the acreage that is granted is as large as it is.

Appellants are two of the villages qualified by section 1610(b) of the Act to receive land benefits under section 1613(a) and (b).

> tionally recognized sharp distinctions between land and water. Simply stated, the sea is so central to the life of an Eskimo that s/he recognizes no distinctions between the two. . . . K. Josephson, *Alaska and the Law of the Sea: Use of the Sea by Alaska Natives—A Historical Perspective,* 91 (1974).

Appellants' Opening Brief 27-8. Appellees do not dispute this assertion.

The Final Environmental Impact Statement (FEIS) for the Norton Sound lease sale describes the subsistence way of life as a "continuation of traditional patterns continuous for several centuries." United States Department of Interior, Final Environmental Impact Statement, OCS Proposed Oil & Gas Lease Sale Norton Sound 47 (1982). *See also id.* at xii (subsistence activities "passed on through countless generations."). The Natives' dependence on hunting, whaling, and fishing extending 20-30 miles off shore is described in detail for each of the affected villages. *Id.* at 47-53 & Graphics 2A, 2B, 2C.

Congress could not have been unaware of such widely known facts of Native Alaskan life and appellants do not argue to the contrary. Mr. Eben Hopson, a witness from Point Barrow, Alaska, reminded the Senate Interior and Insular Affairs Committee: "As far as hunting on the sea is concerned that is continually being used on a year around basis by the Eskimo people, and the same holds true wherever you find an Eskimo village along the coast." *Alaska Native Land Claims: Hearings on S. 1830 Before Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess., pt. II at 335 (1969) [hereinafter *Senate Hearings 1969*]. *See also Alaska Native Land Claims: Hearings on H.R. 13142, H.R. 10193 and H.R. 14212 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess., pt. II at 401-02 (1969) [hereinafter *House Hearings 1969*]; *Alaska Native Land Claims: Hearings on S. 35, S. 835 and S. 1571*

Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., pt. I at 168, 345 (1971) [hereinafter *Senate Hearings 1971*].

Aboriginal fishing and hunting rights are precisely the kind of rights Congress wished to extinguish. Nothing in the legislative history suggests that Congress intended to extinguish such rights in ocean waters within three miles of land but preserve them in the waters beyond. On the contrary, the only directly pertinent legislative material strongly suggests Congress intended to extinguish aboriginal fishing rights in outer continental shelf waters as well.

Early versions of the Act contained no reference to either offshore lands or fishing and hunting rights. *See* S. 2906, 90th Cong. 2d Sess. § 501 (1968) (extinguishing "all claims against the United States based upon aboriginal right, title, use, or occupancy of lands in Alaska. . . ."); S. 1830, 91st Cong., 1st Sess. § 3(a) (1969) (similar language). During Senate hearings in 1969 John Pickering, representative of the Western Oil and Gas Association, pointed out that some of the Native claims "purport to cover waters in addition to land areas" and "to effectuate a complete settlement, the claims should be extinguished as to water, as well as to land, areas." Mr. Pickering suggested this was true "for submerged areas beneath navigable waters in particular," and identified these as including "submerged areas beneath navigable waters [title over which was vested] in the State of Alaska under the grant made to it by the Submerged Lands Act (67 Stat. 29) as made applicable by the Statehood Act (72 Stat. 343), *or in the United States under the Outer Continental Shelf Lands Act* (67 Stat. 462)." *See Senate Hearings 1969, supra,* pt. I at 140, 144, 149 (emphasis added). "In view of this," Mr. Pickering stated, "it would be unfortunate if the legislation overlooked settling the Native claims to waters and thereby left open the possibility that such claims might

be asserted to water areas in the future." *Id.* at 144. To include such areas, Mr. Pickering suggested the extinguishment provision be amended to apply to claims based on use or occupancy not only of lands but also of "waters, and submerged areas in Alaska." *See id.* at 149. The State of Alaska recommended the same language. *See id.*, pt. II at 241. The present language of Section 4 ("including submerged lands underneath all water areas both inland and offshore") was inserted in Senate bills following this hearing.

These events strongly suggest that the reference to "submerged lands" was intended to include lands on the outer continental shelf contiguous to Alaska, and that the general reference to Alaska (as distinguished from the State of Alaska) was not regarded as confining the reach of the extinguishment provision to the three-mile limit.

The express reference in Section 4(b) to "aboriginal hunting or fishing rights" probably also had its genesis in the hearings before the 91st Congress. Arthur J. Goldberg, former Justice of the Supreme Court, appeared before the Senate Committee on behalf of the Alaska Federation of Natives, principal representative of the Natives before Congress. Senator Stevens of Alaska asked Mr. Goldberg whether the Natives agreed that aboriginal fishing and hunting rights should be extinguished. After a rather confusing exchange, Senator Stevens said:

> [W]e are talking about a bill to settle the property claims of the Alaska Native people, not just the land claims, a bill to settle the property rights, including land, and I hope that this bill will be viewed in that manner because I would not want to have to come back here a few years from now and try to get a bill to settle the nonland property claims.

Senate Hearings 1969, supra, pt. II at 299-301. Mr. Goldberg replied:

> The position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title.

Id. at 301. The Alaska Federation of Natives further clarified Mr. Goldberg's response in a supplemental statement which agreed that the settlement should extend to all claims "founded upon aboriginal title or use and occupancy of lands, including claims relative to fishing rights. . . ." *Id.*

During these same hearings, the National Wildlife Federation suggested the bill be strengthened by adding "including any aboriginal hunting or fishing rights that may exist" to the extinguishment provision. *Id.* at 526. This phrase was added without change to the Senate bill and eventually included in the version of the act adopted by Congress.

These witnesses presented similar testimony before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs. The representatives of the Alaska Federation of Natives (AFN) reiterated their view that the act should be a "full and final extinguishment of any and all claims against the United States based upon aboriginal right. . . ." *See House Hearings 1969,* Pt. I, *supra,* at 52. *See also id.* at 265-68. The Governor of the State of Alaska and the representatives of the Western Oil and Gas Association repeated their urgings that the extinguishment section address claims to waters and submerged areas. *See id.* at 138, 154, 310, 312-13, 318. And the National Wildlife Federation recommended to the House Committee addition of the identical phrase to cover aboriginal hunting and fishing rights that it suggested to the Senate Committee. *Id.* at 292.

No legislation passed the 91st Congress, but bills introduced in the 92d Congress reflected this testimony. At least one Senate bill specifically extinguished claims to offshore areas and hunting and fishing rights with language

essentially identical to the present section 4(b). *See* S. 35, 92d Cong., 1st Sess. § 4(a) (1971). Similar language in a House bill referred to "alleged aboriginal hunting and fishing rights that may exist." *See* H.R. 3100, 92d Cong., 1st Sess. § 3(b) (1971).

Only brief hearings were conducted by the House and Senate committees on these and other bills in 1971. Representatives of the Western Oil and Gas Association urged the Senate and House to approve bills with extinguishment sections referring to water, offshore areas, and hunting and fishing rights and criticized bills that failed to include specific language extinguishing such claims. *See Senate Hearings 1971 supra,* pt. II at 578, 581, 583; *Alaska Native Land Claims: Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. 353, 354, 356-57 (1971) [hereinafter *House Hearings 1971*]. The AFN explained before the Senate Committee that its position "on the major provisions of the settlement, as well as most of the details, remains virtually the same as it was in our prior appearances before this committee." *Senate Hearings 1971, supra,* pt. I at 306. The National Wildlife Federation stated again its belief that the settlement should extend to "hunting, fishing, and trapping rights." *Id.* at 386. *See also House Hearings 1971, supra,* at 342.

The Senate passed a bill containing an extinguishment section referring to offshore submerged lands and to hunting and fishing rights. Submerged offshore areas were not specifically extinguished in the House-passed bill, but aboriginal hunting and fishing rights were. The conference committee adopted the broader and more explicit language of the Senate bill, stating the language was "in substance, the same as the language of the Senate amendment." H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 40, *reprinted in* 1971 U.S. Code Cong. & Ad. News, 2247, 2253.

This summary of the history of section 4(b) demonstrates that Congress chose to adopt broad language to extinguish all claims made by Alaska Natives based upon aboriginal right, specifically including claims to hunting and fishing rights in offshore waters above the outer continental shelf.

Based upon the language of section 4(b) of the Claims Settlement Act, taken as a whole, the mandate from Congress to construe the provision broadly to extinguish all aboriginal claims, and the legislative history indicating a specific purpose to extinguish aboriginal hunting and fishing rights, including those in coastal waters, and specifically in outer-continental-shelf waters, we conclude that appellants' claims to an aboriginal right to hunt and fish in Norton Sound were extinguished.

II.

We turn to appellants' contention that the lease sale failed to satisfy the procedural requirements of section 810 of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3120, a claim rejected by the district court on the ground that this statutory provision does not apply to the outer continental shelf.

Title VIII of the Conservation Act, of which section 810 is a part, seeks to preserve the opportunity of rural residents of Alaska to take fish and wildlife for their subsistence. As one means of furthering this purpose, section 810 provides that in determining whether to lease or otherwise permit the disposition of public lands the head of the federal agency having primary jurisdiction of such lands shall evaluate the effect of the proposed action on subsistence uses. No action is to be taken which would significantly restrict subsistence uses unless the head of the agency first satisfies certain procedural conditions, including notice and hearing, and determines that the proposed restriction of subsistence uses is necessary, that the minimal amount of "public lands" are involved, and that

reasonable steps have been taken to minimize the adverse impact on subsistence uses.

Section 810 applies to "public lands." The term "land" is defined as "land, waters, and interests therein." Section 102(1), 16 U.S.C. § 3102(1). The term "public lands" is defined as "land situated *in Alaska.*" Section 102(3), 16 U.S.C. § 3102(3) (emphasis added). As in the construction of the Claims Settlement Act, the question in construing the Conservation Act is whether the limitation "in Alaska" in this definition of "public lands" excludes the outer continental shelf and its covering waters. Our conclusion is the same under both statutes: outer continental shelf lands and waters contiguous to the State of Alaska are included.

As we have said, a geographic term such as "in Alaska" may be used in either a general or technical sense, and reference to the legislative history to resolve the ambiguity is appropriate. *See Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918).

During the House debates the term "in Alaska" was used in its general sense. Representative Morris K. Udall, Chairman of the House Committee on Interior and Insular Affairs, and manager of the bill on the floor, referred to outer continental shelf lands as "in Alaska." 125 Cong. Rec. 9900, 11,128 (1979). So too did Representative Don Young of Alaska, a member of both the Interior Committee and the Subcommittee on General Oversight and Alaska Lands. *See id.* at 9907. Other congressmen referred to "Alaska's" oil resources in terms that necessarily included oil reserves beneath the outer continental shelf. *See id.* at 11,174 (Rep. Huckaby); *id.* at 9893 (Rep. Vento).

In addition to this support for a nontechnical usage of the phrase "in Alaska" to include the outer continental shelf lands and waters, the record of legislative consideration of the Conservation Act contains convincing evidence that Congress intended to include these areas within the reach of section 810.

Appellants make a compelling argument that the provisions of Title VIII of the Conservation Act protecting subsistence uses were intended to have the same territorial scope as provisions of the earlier Claims Settlement Act extinguishing Native hunting and fishing rights. The two statutory provisions are clearly related. When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. The Senate version of the Claims Act included provisions directing the Secretary to protect subsistence uses on public lands. The Conference Committee eliminated this provision, but the Committee made it clear that it did so only because it concluded subsistence resources should be protected by the Secretary of Interior through the exercise of existing administrative authority. The Committee wrote: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *See* H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. Title VIII of the Conservation Act was enacted because the Secretary and the state failed to heed Congress's admonition. *See* S. Rep. No. 413, 96th Cong., 1st Sess. 230-31, *reprinted in* 1980 U.S. Code Cong. & Ad. News, 5070, 5174-75; S. Rep. No. 1300, 95th Cong., 2d Sess. 195-96 (1978); H.R. Rep. No. 1045, 95th Cong., 2d Sess., pt. I at 183-84 (1978); 126 Cong. Rec. 29278 (1980) (Cong. Udall); 125 Cong. Rec. 9904 (1979) (Cong. Udall). It is a reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of the Conservation Act to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary.

Congress's intention to protect subsistence uses by rural residents of Alaska is repeatedly and strongly stated in the

statute itself. It was a stated general purpose of the Conservation Act "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." Section 101(c), 16 U.S.C. § 3101(c). Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife "is essential to [their] existence." Section 801(1), 16 U.S.C. § 3111(1). Congress further found that "to fulfill the policies and purposes of the [Claims Settlement Act] and as a matter of equity, it is necessary . . . to protect and provide the opportunity for continued subsistence uses on the public lands. . . ." Section 801(4), 16 U.S.C. § 3111(4). It is Congress's stated policy that "utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands. . . ." Section 802(1), 16 U.S.C. § 3112(1). The stated purpose of Title VIII in particular "is to provide the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.*

Congressional reports and debates echo these views.[5] It is clear Congress's concern included all rural Alaskans,[6] and, as we have seen, reliance by coastal villagers upon hunting and fishing in waters and on the ice over the outer continental shelf was well known.[7] In strikingly similar

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[5] *See, e.g.*, S. Rep. No. 413, 96th Cong., 1st Sess. 230-33, 267-68, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5174-77, 5211-12; S. Rep. No. 1300, 95th Cong., 2d Sess. 195-96 (1978); H.R. Rep. No. 1045, Pt. I., 95th Cong., 2d Sess. 181-84, 187 (1978); 126 Cong. Rec. 29,278 (1980); 125 Cong. Rec. 9904-05 (1979).

[6] *See* S. Rep. No. 413, 96th Cong., 1st Sess. 268-69, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5212-13; S. Rep. No. 1300, 95th Cong., 2d Sess. 220 (1978); 126 Cong. Rec. 29278-79 (Cong. Udall).

[7] See pp. 6-8, *supra*. *See also Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems, Hearings on H.R. 39, H.R. 1974, H.R. 2876, H.R. 5505, et al., H.R. 1454, H.R. 5605, & H.R. 8651, Before the Subcommittee on General Oversight and Alaska Lands of the House Committee on Interior and*

circumstances, the Supreme Court has twice given an expansive and non-technical interpretation to geographical terms to achieve Congress's apparent purpose to protect native fisheries. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-16 (1949); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

There are other indications of a Congressional intent that section 810 apply to outer continental shelf waters. For example, as originally proposed the subsistence provisions applied only to lands in conservation units established by what are now Titles II through VII of the Conservation Act. *See* H.R. 39, § 701(a), (b), 95th Cong., 1st Sess. (1977). The boundaries of these units were fixed by maps to be approved with the legislation, *see id.* § 1(c), and generally would not have included outer continental shelf areas. In the course of legislative proceedings, the coverage of Title VIII was extended beyond the boundaries of the conservation units to include all public lands in Alaska. *See* 16 U.S.C. §§ 3102(3), 3111, 3112. The boundaries of conservation units remained tied to maps, as they are in the Act as passed. *See* 16 U.S.C. § 3103(a). At the same time, Congress amended the savings clause, 16 U.S.C. § 3125, identifying existing statutes that were not to be considered modified or replaced by the passage of Title VIII, to include the Fishery Conservation and Management Act of 1976, in which the United States asserts exclusive jurisdiction over a fishery conservation zone that extends 200 miles offshore.[8] *See* 16 U.S.C. § 1811-12. Although other explanations may be possible, this change suggests Congress understood that Title VIII applied to outer continental shelf waters.

Insular Affairs, 95th Cong., 1st Sess., pt. XIII at 468, 484, 487, 510-528 (1977) (report discussing Arctic Slope subsistence uses of resources of the ocean and sea ice).

[8] *Compare* H.R. 39, § 701(g), 95th Cong., 1st Sess. (Comm. Print Oct. 12, 1977) *with* H.R. 39, as amended, § 713, 95th Cong., 2d Sess. (1978).

A second example: At least one of the national wildlife refuges created by the Conservation Act (the Yukon Delta National Wildlife Refuge) has within its borders portions of the outer continental shelf and overlying waters. *See* 48 Fed. Reg. 7890, 8017 (Feb. 24, 1983). Unless these lands and waters are included in Title VIII the protection that title provides for subsistence uses would not apply to the entire Wildlife Refuge though one of the specified purposes of the Refuge is "to provide . . . the opportunity for continued subsistence uses by local residents." *See* Conservation Act, Pub. L. No. 96-487, § 303(7)(B)(iii), 94 Stat. 2371, 2392.

The most compelling reason for resolving the ambiguous language of Title VIII in favor of coverage of outer continental shelf lands and waters is that Title VIII was adopted to benefit the Natives. Under a familiar rule of statutory construction doubtful language should be construed to further that purpose. *See Alaska Pacific Fisheries* v. *United States,* 248 U.S. at 89; *United States* v. *Dann,* 706 F.2d 919 at 931, quoting *United States* v. *Santa Fe Pacific R.R.,* 314 U.S. 339, 353-54 (1941); *Puyallup Indian Tribe* v. *Port of Tacoma,* 717 F.2d 1251, 1257 n.6 (9th Cir. 1983). Congress was specifically advised that this rule of construction would be applied to Title VIII and other subsistence provisions though not to the rest of the Act. In the course of a detailed discussion of the proposed legislation submitted to the House, Congressman Udall said with specific reference to Title VIII:

> While the [Conservation Act] obviously is not Indian legislation in its entirety, the subsistence title and the other subsistence related provisions are. And under well-recognized canons of statutory construction, any ambiguities in the title and other provisions must be resolved in favor of the Alaska Native people.

> This result is also consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.

126 Cong. Rec. 29,279 (1980). *See also* 125 Cong. Rec. 9904 (1979).

As appellees have demonstrated, reasonable arguments can also be made for a narrow construction of section 810. We find them unpersuasive, however, in light of the evidence of a contrary legislative intent and the admonition that ambiguities in Title VIII "must be resolved in favor of the Alaska Native people."

Appellees rely particularly upon reference to the Conservation Act as a "land bill" that would not inhibit development of oil and gas resources on the outer continental shelf. *See e.g.*, 125 Cong. Rec. 11,128 (1979) (statement of Rep. Udall); *id.* at 11,170 (statement of Rep. Emery). These statements were made in response to arguments that the Conservation Act "locked up" Alaskan resources. The statements did not refer to Title VIII but rather to Titles II-VII which add lands to the National Park System and other conservation units. Oil and gas exploration and production in fact would be precluded in some of these conservation units and probably in others. Congressmen Udall and Emery were making the point that these conservation units did not include the adjacent outer continental shelf and therefore creation of such units did not preclude oil and gas development on the shelf. *See also* S. Rep. No. 413, 96th Cong., 1st Sess. 417, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5357.

These statements are not inconsistent with the position that Title VIII includes the outer continental shelf since nothing in Title VIII precludes oil and gas development in the areas to which it applies. The only restrictions imposed by section 810 are procedural ones. Once these are com-

plied with, "the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law." Section 810(d), 16 U.S.C. § 3120(d). In the words of the Senate Report: "[O]nce the requirements of the section are satisfied and incorporated into existing land use planning processes the proposed action may proceed even though its effect may be adverse to subsistence uses." S. Rep. No. 413, 96th Cong., 1st Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5178.[9]

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[9] The response to other arguments against a broad interpretation of section 810 may be stated briefly.

Rejection by Congress of proposals to extend the coverage of conservation units to areas beyond the territorial sea, (*See, e.g.*, S. Rep. No. 1300, 95th Cong., 2d Sess. 149-50 (1978); 124 Cong. Rec. 18025-27 (1978)) is not relevant to the interpretation of Title VIII for the reason mentioned: inclusion in a Title II-VII conservation unit might bar future development, but inclusion in Title VIII would not. Moreover, the "complexity of jurisdictions" that would have resulted from extension of conservation units seaward, *id.*, would not occur under Title VIII since this title contemplates administration of both state and federal lands by the state for the purpose of this section (§ 805(d), 16 U.S.C. § 3115(d)). *See also* 126 Cong. Rec. 29280 (1980).

Other federal statutes applicable in one fashion or another to resource management on the outer continental shelf are neither so comprehensive nor inconsistent with Title VIII as to support an inference that Title VIII does not apply to these areas. Section 810(b) provides expressly for situations in which both Title VIII and the National Environmental Protection Act, 42 U.S.C. § 4321, *et seq.*, will be applicable. Other statutes of general applicability mentioned by appellees (the Endangered Species Act, 16 U.S.C. § 1531-43; the Coastal Zone Management Act, 16 U.S.C. §§ 1451-54; and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56) pursue different goals by different means than Title VIII of the Conservation Act, and may be applied consistently with Title VIII.

Appellees argue that subjecting outer continental shelf lands and waters to certain provisions of the Act other than Title VIII in which the term "public lands" is used would provide "absurd and unintended

We conclude that the ambiguous language of the Conservation Act should be interpreted to include outer continental shelf lands and waters within the coverage of section 810.

III.

Appellants ask that the lease sale be voided because the Secretary has not complied with the requirements of section 810. Appellees contend the Secretary has substantially complied with the requirements of the section, albeit acting under other statutes, and if he has not, the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810, citing *California* v. *Watt,* 683 F.2d 1253, 1266 (9th Cir. 1983), *reversed on other grounds,* ____ U.S. ____, 104 S. Ct. 656 (1984).

These arguments raise factual and legal issues that have not been but should be considered initially by the district court.

Appellants' request for attorneys' fees is denied. Assuming appellants are prevailing parties we cannot say the government's position was not "substantially justified." *See Rawlings* v. *Heckler,* 725 F.2d 1192, 1196 (9th Cir. 1984); *Foster* v. *Tourtellotte,* 704 F.2d 1109, 1112-13 (9th Cir. 1983).

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

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consequences." We have examined the provisions relied upon by appellees and are satisfied the interpretative difficulties they suggest are resolvable. We need not examine them in detail here, however, since in any event Congress was aware that a standard of interpretation requiring resolution of ambiguities in favor of the Natives would be applicable only to Title VIII and other subsistence provisions of that Act. *See* 126 Cong. Rec. 29,279 (1980); 125 Cong. Rec. 9904 (1979).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

D.C. No. CV A-81-019JMF
No. 82-3678

INUPIAT COMMUNITY OF THE ARCTIC SLOPE AND UKPEAGVIK INUPIAT CORPORATION, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding
Argued and Submitted October 7, 1983

Before: BROWNING, Chief Judge, HUG, Circuit Judge, and REED*, District Judge.

OPINION

PER CURIAM:

Appellants, members of the Inupiat Community of the Arctic Slope, sued to enjoin oil development off the North Slope of Alaska in the Beaufort and Chukchi Seas.

Appellants rest their suit primarily upon a claim of aboriginal title based upon centuries of occupancy and use of sea ice many miles from shore for subsistence hunting and fishing.

For reasons stated in *People of the Village of Gambell* v. *Clark*, Nos. 83-3735X, 83-3781 (9th Cir., July 1984), argued and decided with this case, we hold that any abo-

* Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

riginal rights appellants may have had were extinguished by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1626.

We agree with the district court (*Inupiat Community of the Arctic Slope* v. *United States,* 548 F. Supp. 182, 188 (D. Alaska 1982)), that appellants' general trust claims are barred by collateral estoppel. *See North Slope Borough* v. *Andrus,* 642 F.2d 589, 611-13 (D.C. Cir. 1980). *See also California* v. *Watt,* 668 F.2d 1290, 1324-25 (D.C. Cir. 1981).

We also reject appellants' claim based upon the Final Act, Conference on Security and Cooperation in Europe, Helsinki, *reprinted in* 73 U.S. Dept. State Bull. 323 (1975) and the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). Assuming these international understandings are applicable, appellants point to no provision of either that could be interpreted as imposing upon the United States a greater obligation to protect the subsistence culture of the Natives than that imposed upon the United States by federal domestic law—an obligation already satisfied. *See North Slope Borough* v. *Andrus, supra.* Nor have appellants made any showing of a universal recognition of such a greater obligation that would be necessary to establish a claim based on the law of nations. *See Filartiga* v. *Pena-Irala,* 630 F.2d 876, 881-84 (2d Cir. 1980).

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

N83-003 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

JAMES S. WATT, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF INTERIOR, DEFENDANTS

ARCO ALASKA, INC., ET AL., DEFENDANT-INTERVENORS.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on plaintiffs' motion for summary judgment. There are two issues before the court in this motion, both of which can be answered as a matter of law.

I. § 810 of ANILCA

The parties disagree as to whether the "public lands" reference in § 810(a) of ANILCA was meant to include federal lands and waters lying seaward of the three-mile territorial boundaries of Alaska. The court agrees with defendants and defendant-intervenors, and holds that § 810(a) is inapplicable to such lands on the Outer Continental Shelf.

To determine the meaning of "public lands" the court need merely look to the definitional section in title I of ANILCA. Congress gave the term a specific meaning for the purpose of the Act. Public lands means "land situated *in Alaska*" to which the United States holds title. § 102(3)

of ANILCA (emphasis added). The court believes the plain meaning of this phrase is clear and rejects plaintiffs' attempts to manufacture an ambiguity. The court has also reviewed the legislative history and further concludes there is no persuasive evidence that Congress intended the phrase "public lands", as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska. It is significant to the court that Congress did not mention the Outer Continental Shelf in deliberations concerning both § 102(3) and § 810(a).

II. Aboriginal Rights

Plaintiffs assert the lease sale at issue will injure their possessory interests based on alleged aboriginal hunting and fishing rights. The court rejects this argument and holds that, consistent with Judge Fitzgerald's opinion in *Inupiat Community of Arctic Slope* v. *United States,* plaintiffs have no property rights in the Outer Continental Shelf lands subject to this lease sale. 548 F.Supp. 182, 188 (D. Alaska 1982), *appeal pending,* No. 82-3678 (9th Cir. 1982).

Accordingly, IT IS ORDERED:

1) THAT plaintiffs' motion for summary judgment is denied as to both claims for relief set forth in the complaint.

2) THAT federal defendants' motion to dismiss will be decided as soon as briefing is completed.

DATED this 4th day of April, 1983, at Anchorage, Alaska.

_____

United States District Judge

cc: Donald Cooper
U.S. Attorney
Carl J. D. Bauman

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
DC# CV-A-85-184

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS-APPELLEES,

AND

ARCO ALASKA, INC., ET AL.,
INTERVENORS-APPELLEES.

Before: SNEED, NELSON, and NORRIS, Circuit Judges.

ORDER

Plaintiffs' emergency motion for an injunction pending appeal is denied. The temporary stay entered June 5, 1985, has expired.

Within 7 days of the entry of this order, the Secretary of the Interior, in conjunction with the intervenors-appellees, shall file with the court a hold harmless agreement that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands. *See* 16 U.S.C. § 3120. This panel shall retain jurisdiction of the matter for the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement. Upon submission for decision, the merits panel shall determine whether the hold harmless agreement should remain in effect.

This appeal is expedited. No prebriefing conference will be held. Appellants shall file their opening brief on or before June 28, 1985. Appellees shall file their answering briefs on or before July 19, 1985. Appellants may file a reply brief within 7 days of the service date of appellees' briefs. No extensions of time will be granted.

The Clerk shall calendar this case for oral argument in Seattle in September.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
(District Court Civil Nos. A85-184 & A85-201)

THE PEOPLE OF THE VILLAGE OF GAMBELL, ET AL., APPELLANTS,

v.

DONALD P. HODEL, ET AL., AND AMOCO PRODUCTION CO., ET AL., APPELLEES.

HOLD HARMLESS AGREEMENT

WHEREAS the People of the Village of Gambell (Gambell) and the People of the Village of Stebbins (Stebbins) on March 14, 1983, filed an action in the United States District Court for the District of Alaska (District Court) (No. N83-003, redesignated No. A85-184) under Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, unsuccessfully seeking to enjoin Outer Continental Shelf (OCS) Sale No. 57 (Norton Sound) and subsequently, on April 4, 1985, filed a motion for preliminary injunction against exploratory drilling and related operations on the Sale No. 57 leases;

WHEREAS Gambell and Nunam Kitlutsisti (NK) on April 25, 1985, filed a complaint in the District Court (No. A85-201) alleging that OCS Sale No. 83 (Navarin Basin) was conducted in violation of Section 810 of ANILCA and sought a preliminary injunction against exploratory drilling and related operations on the Sale No. 83 leases;

WHEREAS on May 24, 1985, the District Court denied the motions for preliminary injunction of Gambell, Stebbins and NK and they appealed that action to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) and moved that Court to enter an injunction pending

appeal that would prohibit exploratory drilling and related operations on Sale Nos. 57 and 83 leases;

WHEREAS Exxon Corporation (Exxon) intends to conduct and ARCO Alaska, Inc. (ARCO) has been authorized to conduct exploratory drilling and related operations during the ice-free season of 1985 upon Sale No. 57 leases as operators on their own behalf, as well as on behalf of other well participants, and Exxon has made financial commitments of about $10 million to undertake these operations;

WHEREAS Amoco Production Company (Amoco), ARCO and Exxon intend to conduct exploratory drilling and related operations during the ice-free season of 1985 upon Sale No. 83 leases as operators on their own behalf, as well as on behalf of other well participants, and have made financial commitments of more than $60 million to undertake these operations;

WHEREAS an order entered by the Ninth Circuit on June 6, 1985, denied Gambell, Stebbins and NK's motion for injunction pending appeal, but reserved the authority to reinstate a temporary stay, which had enjoined exploratory drilling and related operations, if the Secretary of the Interior in conjunction with intervenor-appellees, Amoco, ARCO and Exxon, *et al.,* fails to file within seven days of the entry of the Court's order a "hold harmless agreement that will protect appellants [Gambell, Stebbins and NK] from any consequences resulting from significant restrictions upon subsistence uses by appellees of their lands," within the meaning of Section 810 of ANILCA;

NOW THEREFORE, Amoco, ARCO and Exxon represent to the Secretary of the Interior that they will abide by the terms of the following agreement:

1. Amoco, ARCO and Exxon will hold harmless Gambell and NK from any consequences resulting from significant restrictions upon subsistence uses by these appellants of their lands that are proximately caused by Amoco, ARCO or Exxon's conduct of exploratory drilling

or related operations during the 1985 drilling season on their Sale No. 83 leases.

2. Exxon and ARCO will hold harmless Gambell and Stebbins from any consequences resulting from significant restrictions upon subsistence uses by these appellants of their lands that are proximately caused by Exxon or ARCO's conduct of exploratory drilling or related operations during the 1985 drilling season on their Sale No. 57 leases.

3. For purposes of this agreement the terms

(a) "significant restrictions upon subsistence uses" shall be limited to:

> "(1) A reduction in the availability of harvestable resources caused by a decline in the population of subsistence resources;
>
> "(2) A reduction in the availability of resources caused by an alteration in their distribution or location; or
>
> "(3) The limitation of access by subsistence harvestors."

See Kunaknana v. *Watt,* No. A-83-337 Civ. (December 20, 1983), *aff'd, Kunaknana* v. *Clark,* 742 F.2d 1145 (9th Cir. 1984), transcript of oral opinion, pp. 41-42, attached as Exhibit F to Intervenor-Defendants-Appellees' Memorandum of June 3, 1983, in the above-captioned proceeding. "Significant restrictions upon subsistence uses" shall not include "slight effect[s] as opposed to large or substantial effects." *See Id.* at 42.

(b) "Consequences" shall mean losses of subsistence foods or other physical subsistence resources and shall not include claims for psychological, cultural, religious, emotional, or similar losses.

4. If an appellant establishes that a significant restriction upon subsistence uses has been proximately caused solely by the exploratory drilling or related operations of only one company, that company alone shall be responsi-

ble to hold harmless the affected appellant. If an appellant establishes that a significant restriction upon subsistence uses has been proximately caused by exploratory drilling or related operations on either Sale No. 83 or Sale No. 57 leases, but cannot establish the responsibility of a particular company, all companies then conducting in the relevant lease area the type of operations that proximately caused such restriction shall be severally liable based on principles of comparative fault.

5. Should a dispute arise regarding whether a particular restriction upon subsistence uses is in fact significant within the meaning of this agreement, whether a significant restriction has been proximately caused by exploratory drilling and related operations on either Sale No. 57 or Sale No. 83 leases, or whether the money damages tendered in satisfaction of this hold harmless agreement are sufficient to compensate the affected appellant, the dispute shall be submitted to the District Court, exercising jurisdiction in No. A85-184 & A85-201, under such procedures, including the appointment of a special master, as the District Court may direct.

6. Amoco, ARCO and Exxon's obligations under this agreement are conditioned upon appellants first submitting, pursuant to Title III of the 1978 Amendments to the OCS Lands Act, 43 U.S.C. §§ 1811-1824, any claims for a significant restriction arising out of an oil spill. This agreement will hold appellants harmless with respect to such claims only to the extent that the direct-liability provision of that Title, 43 U.S.C. § 1814, and/or the Offshore Oil Pollution Compensation Fund established by it, 43 U.S.C. § 1817, do not provide appellants adequate compensation for any significant restriction upon subsistence uses of their lands that has been caused by Amoco, ARCO or Exxon.

7. This agreement shall expire 10 days following the submission of the above-captioned case to a merits panel of the Ninth Circuit, unless that panel extends the term of the

agreement during the pendency of its consideration of the case, in which event this agreement shall expire at the end of the 1985 drilling operations or when the merits panel renders its final decision, whichever comes earlier, provided, however, that appellants may assert claims for losses occurring during the term of this agreement for up to 12 months following expiration of this agreement and paragraph 5 will remain in effect for the purpose of resolving such claims.

Accepted:

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June 12, 1985

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June 12, 1985

/s/ LEONA A. POWER
Leona A. Power
Deputy Assistant Secretary—
Land & Minerals Management
United States Department of
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18th & C Streets, N.W.
Washington, D.C. 20240

June 12, 1985

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-2977
DC# CV-A 85-184 JAV
Alaska (Anchorage)

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS-APPELLEES,

AND

ARCO ALASKA, INC., ET AL.,
INTERVENORS-APPELLEES.

Before: SNEED, NELSON and NORRIS, Circuit Judges

ORDER

The panel has reviewed the hold harmless agreement submitted on June 13, 1985, by the Secretary of the Interior, in conjunction with the intervenors-appellees, in compliance with this court's June 6, 1985 order. The panel has concluded that, with two exceptions, the hold harmless agreement is adequate to protect appellants' interests at this stage of the proceedings. The panel that decides this appeal on its merits may review the agreement to determine its continued adequacy.

This panel makes the following two changes in the agreement:

(1) Paragraph 4 is amended to provide that appellants have the initial burden to establish only that a signifi-

cant restriction upon subsistence uses has been proximately caused by exploratory drilling or related operations of intervenors-appellees. Once appellants have established the existence of a subsistence restriction, the burden shall shift to intervenors-appellees to establish that the responsibility lies with a particular company or companies. If intervenors-appellees are unable to do so, then all companies conducting operations in the relevant lease area of the type that caused the restriction shall be jointly and severally liable for damages to appellants.

(2) Paragraph 7 is amended to provide that the hold harmless agreement shall remain in effect until further order of this court.

Appellants' waiver of additional briefing, request for immediate transfer to merits panel, and request for immediate argument are denied. The parties shall abide by the briefing schedule established in the June 6, 1985 order.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
A85-184 cons. A85-201

PEOPLE OF THE VILLAGE OF GAMBELL,
PEOPLE OF THE
VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
AND U.S. DEPARTMENT OF THE INTERIOR,
DEFENDANTS-APPELLEES,

ARCO ALASKA, INC., AMOCO PRODUCTION CO., ET AL.,
DEFENDANTS-INTERVENOR-APPELLEES.

APPEAL from the United States District Court for the _____ District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ALASKA (ANCHORAGE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is REVERSED & REMANDED.

cy: James Bamberger
Bruce Landon
Carl Bauman
Judge von der Heydt

Filed and entered OCTOBER 25, 1985

APPENDIX J

UNITED STATEMENT DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE
WASHINGTON, DC 20240

Finding of No Significant Restriction of Subsistence Uses Lease Sale 57 (Norton Basin)

I have reviewed the attached evaluation prepared under section 810 of the Alaska National Interest Lands Conservation Act. It considers the effect of Lease Sale 57 on subsistence uses and needs, the availability of other lands within the Norton Basin for oil and gas leasing, and alternatives which would reduce or eliminate the leasing of lands needed for subsistence.

I find that the leasing of tracts in Sale 57 will not significantly restrict subsistence uses.

Attachment

(SIGNATURE)
Acting Director

April 22, 1985

SECTION 810
LEASE SALE 57

The Department of the Interior maintains that neither Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) nor the subsistence evaluation procedures in Section 810 of ANILCA apply to Outer Continental Shelf (OCS) leasing activities. In light of the Ninth Circuit Court's decision, November 2, 1984, *Gambell and Stebbins* v. *Clark,* the Minerals Management Service (MMS) has prepared the following evaluation under Section 810 of ANILCA. This evaluates the effects of Norton Basin lease Sale 57 on subsistence uses and needs, the availability of other lands, and other alternatives which would reduce or eliminate the use of the lease sale area needed for subsistence purposes.

ANILCA (Public Law 96-487) provides in Section 810 that:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such federal agency—

(1) gives notice to the appropriate state agency and the appropriate local committees and regional councils established pursuant to Section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to Section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

To determine if a significant restriction of subsistence uses and needs is reasonably foreseeable as a result of the proposal, the following three factors have been considered:

(a) likelihood to reduce the population of harvestable resources;

(b) likelihood to reduce the availability of resources by alteration of their normal distribution patterns; and

(c) likelihood of limitation of access to subsistence resources.

Section 810 of ANILCA does not define the level of restriction which would be "significant." A large reduction

in the abundance of a harvestable resource, major redistributions of those resources, or substantial interference with harvester access to active subsistence sites, or a major increase in non-subsistence harvests by non-rural, non-resident OCS workers would all be significant restrictions. No or a slight reduction in the abundance harvestable resources, no effect (or slight inconvenience) on the ability of harvesters to reach and use active subsistence harvesting sites, and no substantial increase in competition for harvestable resources from non-subsistence harvesters by non-rural, non-resident OCS workers would not be significant restrictions.

Recent case law distinguishes the lease sale from other stages of OCS development, i.e., exploration, development and production. Thus, we are required to consider at this stage only the effects of the lease sale, and not the effects of exploration or development and production. Nevertheless, each of the three stages are examined separately. Since each of these stages has a different probability of occurring as well as a different potential for affecting the environment, this division will also better identify the possible restrictions of each stage on subsistence uses. Future stages are evaluated to the extent possible at this time. We emphasize that, at present, no development and production plans have been proposed. For this reason, the discussion of the development & production stage is based on the hypothetical scenarios and oil-spill-risk-analysis included in the 57 FEIS (USDOI MMS 1982). The stages examined below are:

- Lease Sale
- Exploration
- Development and Production

To repeat, however, we are not required to consider anything other than the lease sale (and associated preliminary activities) at this stage. Therefore, the discussion of subsequent stages (exploration, development & produc-

tion) should not be viewed as the final 810 evaluation for those stages, and should not be regarded as a statement of events which will actually occur.

Summary of the 810 Evaluation for Lease Sale 57.

- *Lease Sale:* Lease Sale 57 occurred in 1982. It has not and will not significantly restrict subsistence uses, for the reasons explained below.
- *Exploration:* Exploratory activities, due to Sale 57, have occurred. To date, they have not significantly restricted subsistence uses. Future exploratory activities will not significantly restrict subsistence uses, for the reasons explained below. An 810 evaluation will be done as each exploration plan is submitted for approval.
- *Development and Production:* At present, no development or production activities are proposed on Sale 57 leases. If they do occur, they may significantly restrict subsistence uses in certain areas.

MMS emphasizes that these development and production activities are not likely to occur. Resource estimates indicate only a 14 percent chance of discovering economically recoverable amounts of oil due to Sale 57. Moreover, nothing in the analysis which follows indicates that development and production activities, due to Sale 57, would lower the long term viability of subsistence in the Norton Basin. Finally, since no development or production activities have been proposed, their precise location, timing, or level of intensity is uncertain. Therefore, if development and production plans are submitted to MMS for review and approval, the possible restrictions to subsistence uses will be analyzed pursuant to section 810 of ANILCA before the development and production plans would be approved.

Evaluation for Lease Sale 57

Subsistence resources and uses in the potentially affected area are discussed in the following documents which are incorporated by reference:

- OCS Environmental Assessment EA AK 81-05 (October 1981), Sec. II.D.
- OCS Environmental Assessment EA AK 83-05 (December 1983), Sects. II.D. and III.D.
- Norton Sale 57 FEIS (USDOI, MMS, 1982), Sects III.B.3 and IV.B.1.c.
- Norton Sale 100 DEIS (USDOI, MMS, 1985), Sects III.C.1, III.D.2, IV.B.2.a, IV.B.3.6, and IV.L.

Also considered were the following reports:

- Technical Report #89, Little, R.L. and L.A. Robbins. 1984. Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island. Prepared for USDOI, MMS, Alaska OCS Region, Socioeconomic Studies Program, Anchorage, AK.
- Technical Report #90, Jorgenson, J.G. 1984. Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: Norton Sound. Prepared for USDOI, MMS, Alaska OCS Region, Socioeconomic Studies Program, Anchorage, AK.
- Exxon's Environmental Report (ER) November, 1983. Sections 3.4.11. and 4.4.11.
  ARCO's Environmental Report (ER), February 1984. Sections III.D.11 and IV.F.1.g.

1. *Lease Sale Area (Area offered for Lease in Sale 57)—Factors Affecting Subsistence Uses and Needs:* Subsistence activities, although concentrated on land, along the coasts, and near shore, occur throughout much of the marine environment in the lease-sale area (see Graphic 2A, Sec. III.B.3, 57 FEIS). Areas of particular concern include territories north and west of St. Lawrence Island which sometimes expand as far as 60 miles out to sea and a band of territory along the coast of the mainland. This band is between 20 and 30 miles wide but expands to include territories several miles west of King Island.

In addition to the discussion of subsistence resources and uses, the Sale 57 FEIS and the Sale 100 DEIS include a forecast of future subsistence trends. According to this forecast, villages located in the study area are expected to exhibit a continued dependence on subsistence; per capita levels of dependence are expected to remain stable during the projected life of the oil field. The City of Nome is also expected to exhibit continued dependence on subsistence, although per capita levels may drop if the relative size of the city's non-Native population increases.

The 810 evaluation of the development and production stage is based on the development and production scenario in Section II.A. of 57 FEIS. This scenario provides the hypotheses and assumptions necessary to make such a determination. Since, at present, no development and production plans exist, the scenario assumes that oil and gas well [sic] be found in economically recoverable amounts; it further assumes that one or more oil spills of 1,000 barrels or greater will occur during the productive life of the field. Resource estimates indicate, however, that there is only a 14-percent chance of discovering commercially recoverable amounts of oil consequent to Sale 57. According to the Sale 57 FEIS, if oil is found in these quantities, there is a 94-percent chance of one or more oil spills of 1,000 barrels or greater. However, because of new information these figures have been revised downward. According to DEIS 100, only a 13-percent chance exists of discovering commercially recoverable oil in the Sale 57 area; if oil is found in these quantities, there is only a 78-percent chance of one or more spills of 1,000 barrels or greater.

To determine the potential significant effects on subsistence uses and needs, the following criteria have been considered: (1) potential to reduce the population of harvestable resources; (2) potential to reduce availability of resources by alteration of their normal distribution patterns; and (3) limitation of access to subsistence resources.

a. *Potential to Reduce the Population of Harvestable Resources:* For the purpose of analyzing the significance of the effects of the three stages on subsistence for this 810 determination, the Norton Basin study area has been divided into four regions: inner Norton Sound, the Yukon River Delta, St. Lawrence Island, and Nome/Cape Nome (see DEIS 100 Secs. III.C.1. and IV.B.2.a.).

(1) *Inner Norton Sound:* There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident, but are not expected to occur and have not occurred. The general location of endangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the location of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred. Also, noise and traffic disturbance due to supply boats and helicopters during the exploratory or development and production stages will have little effect on the size of the populations of the region's harvestable resources. Inner Norton lies wil[sic] outside of the leased area, hence beyond any anticipated seismic activity associated with this lease sale (see Fig. II-B-2 and Graphic

2A, Sec. III.B.3., 57 FEIS). Moreover, air-and boat-supply traffic occurs in a direct line from Nome and/or Cape Nome to the exploration platforms. Supply traffic is expected to follow a similar course should the development and production stage occur. Such supply lines lie well outside of inner Norton Sound's subsistence territories. Therefore, the inner Norton region should experience little if any noise and traffic disturbance during exploration or the development and production phase should it occur. Such local and intermittent disturbance would not significantly reduce the populations of the region's harvestable resources.

According to the biological analysis, most effects on the size of the populations of harvestable resources would come from oil spills. Oil spills are very unlikely unless the development and production stage is reached. Should oil spills occur, Stipulation No. 4 (a drilling restriction in pack and broken ice) may help insure oil spill cleanup capability. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Secs. IV.B.2.6., c., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish, and whitefish are expected to be moderate to low. Effects on birds are most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within populations may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. Because of the currents, prevailing winds, and ice conditions in the lease area and because of the location of the sale, inner Norton Sound has an extremely low chance of experiencing the effects of a potential oil spill. The analysis of subsistence in the 57 EIS takes into account the local nature of subsistence systems. Because

levels of noise disturbance would be low and occur well out to sea and because it is very unlikely that a spill would occur and oil the inner Norton Sound area, restrictions on subsistence in the region are not likely to be significant. While a resource in this region may be affected, effects are likely to be intermittent, last less than 1 year, and not make any species unavailable to a village in the inner Norton Sound region.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* Exploration activities will be minimal in this region. Such activities have not restricted and will not significantly restrict subsistence uses.
- *Development and Production:* The kinds of short-term effects to the populations of harvestable resources that may occur during the development and production stage will not significantly restrict subsistence uses in this region.

(2) *Yukon River Delta:* In response to subsistence and environmental concerns, 11 blocks within 12 miles of the Yukon Delta were not offered for lease in Sale 57. There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident, but have not occurred and are not expected to occur. The general location of endangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the location of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben

Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred or are expected to occur. Also, noise and traffic disturbance due to supply boats and helicopters during the exploratory or development stages will have little effect on the size of the populations of the region's harvestable resources. The Secretary elected not to offer for lease 11 blocks within 12 miles of the Yukon Delta, due to subsistence biological concerns. Although some leased blocks in the Sale 57 area fall within the area exploited by Delta villages (see Graphic 2A, Sec. III.B.3., 57 FEIS), most of the Delta's subsistence areas are not included. Moreover, air- and boat-supply traffic occurs in a direct line from Nome and/or Cape Nome to the exploration platforms. Supply traffic is expected to follow a similar course should the development and production stage occur. Therefore, the Yukon River Delta should experience little noise and traffic disturbance during exploration or the development and production stage should it occur. Such local and intermittent disturbance would have an insignificant effect on the populations of the region's harvestable resources.

According to the biological analysis, most effects on the size of the populations of harvestable resources would come from oil spills. Oil spills are very unlikely unless the development and production stage is reached. Should oil spills occur, Stipulation No. 4 (a drilling restriction in pack and broken ice) may help insure oil spill cleanup capability. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Secs. IV.B.2.b., c., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish and whitefish are expected to be moderate to low. Effects on birds are

most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within the population may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. Because of the currents, prevailing winds, and ice conditions in the study area and because of the location of the sale, the Yukon Delta has an extremely low chance of experiencing the effects of a potential oil spill. The analysis of subsistence in the 57 EIS takes into account the local nature of subsistence systems. Because levels of noise disturbance would be low and occur well out to sea and because it is very unlikely that an oil spill would occur and oil the Yukon Delta, restrictions on subsistence on the Delta are not likely to be significant. While a resource in this region may be affected, effects are likely to be intermittent, last less than 1 year, and not make any species unavailable to a Yukon River Delta village.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* The limited and short-term effects of exploration activities have not restricted and will not significantly restrict subsistence uses.
- *Development and Production:* The kinds of short-term effects to the populations of harvestable resources that may occur during the development and production stage will not significantly restrict subsistence uses in this region.

(3) *St. Lawrence Island:* There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident, but have not occurred and are not expected to occur. The general location of endangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the loca-

tion of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred or are expected to occur. During the exploratory and development and production stages noise and traffic disturbance from supply boats and helicopters will have little effect on the size of the populations of the study area's harvestable resources. During these stages, Stipulation No. 5 (a seasonal drilling restriction) may help protect bowhead whales. If the development and production stage is reached, disturbance from oil tankers also would have little effect. None of the lease area falls within the area exploited by St. Lawrence Islanders (see Graphic 2A, Sec. III.B.3, 57 FEIS). Moreover, air- and boat-supply traffic occurs in a direct line from Nome and/or Cape Nome to the exploration platforms. Supply traffic is expected to follow a similar course should the development and production stage occur. Furthermore, most oil tanker traffic should occur east of the areas exploited by the islanders. Therefore, while some short-range and short-term displacement of marine mammals may occur (see below, Potential to Reduce Availability of Resources by Alteration of Their Normal Distribution Patterns), few effects due to noise and traffic

are expected on the populations of the animals hunted by St. Lawrence Islanders even if the development and production stage is reached.

According to the biological analysis, most effects on the size of the populations of harvestable resources due to Sale 57 would come from oil spills should the development and production stage occur. Stipulation No. 4 (a drilling restriction in pack and broken ice) may help mitigate the possible effects of oil spills. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Sects. IV.B.2.6., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish, and whitefish are expected to [sic] moderate to low. Effects on birds are most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within populations may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. The probability of an oil spill of 1000 barrels or greater contacting sea segments from Cape Douglas to St. Lawrence is less than 20-percent (see Fig. IV.A.4.C.-2 Sale 57 FEIS). If oil contacts one of these biological resource areas during the summer, it is likely to affect the subsistence populations exploited by St. Lawrence Islanders. While biological effects to a species population for the entire study area would be low, these effects would be concentrated in areas used by St. Lawrence hunters.

Because of the possibility of adverse effect as described in the preceding paragraphs (i.e., subsistence activities may be adversely affected by the low levels of noise and disturbance; biological effects to a species population from a potential oil spill would be concentrated in areas used by the Region's subsistence hunters), restrictions to St. Lawrence Island's subsistence uses may be significant

should the production stage be reached. One or more important subsistence resources could become unavailable to one or more villages for a period of 1 year or less. If such a spill occurred, marine and coastal birds would most likely suffer local population losses; walrus might also be oiled (see Secs. IV.B.1.d and IV.B.2.a Sale 100 DEIS). Although such effects may or may not decrease the total amount of subsistence foods in the diet, they would affect the relative amounts of the various subsistence foods consumed. People may, for example, be forced to forego preferred foods such as seabirds and eat less desirable foods. Such effects also would increase the expenditure of time and/or money necessary for adequate harvests and thus raise the cost of subsistence.

It is unlikely that more than one or two villages would experience such restrictions. It is unlikely that these restrictions would last more than one or two years. However, such restrictions on subsistence would be community-wide and measurable. Although these are not the most likely consequences (there is only a 13-percent chance or less under current estimates of finding commercial quantities of oil), they are likely to occur if production occurs.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* The limited and short-term effects on populations of harvestable resources by exploration activities have not and will not significantly restrict subsistence uses.
- *Development and Production:* The development and production stages of the proposal may significantly restrict subsistence uses in the St. Lawrence Island region if oil is discovered in economically recoverable quantities.

Nome/Cape Nome: There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident but have not occurred and are not expected to occur. The general location of en-

dangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the location of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred or are expected to occur. Noise and traffic disturbance during the exploratory and development and production stages from supply boats and helicopters would have little effect on the size of the populations of the study area's harvestable resources. If the development and production stage is reached, disturbance from oil tankers would also have little effect. However, potential effects would be concentrated in the Nome/Cape Nome region. Oil tankers are expected to load at Cape Nome and travel south. Air- and boat-supply traffic is expected to originate at Cape Nome and/or at the Nome airport and radiate out to the various exploration and production platforms. Such disturbances may affect local populations of nesting birds and hauled-out marine mammals, but only to a negligible degree. Such noise and traffic disturbance would, occasionally, interfere with subsistence activities but should not have a significant effect on the populations of the animals hunted in the Nome/Cape Nome region even if the development and production stage is reached.

According to the biological analysis, most effects on the size of the populations of harvestable resources due to Sale 57 would result from oil spills should the development and production stage occur. Stipulation No. 4 (a drilling restriction in pack and broken ice) may help mitigate possible oil spills. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Secs. IV.B.2.b., c., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish, and whitefish are expected to be moderate to low. Effects on birds are most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within populations may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. The probabilities of an oil spill of 1000 barrels or greater contacting land or sea segments in the region within 10 days is less than 11-percent for the land segments from Stebbins to Cape Douglas and less than 20-percent for the sea segments from Cape Douglas to St. Lawrence Island (see Fig. IV.A.4.c.-2, Sale 57 FEIS). Oil spills contacting the sea segments between Cape Douglas and St. Lawrence Island (Chirikof Basin) could affect the population of large marine mammal resources utilized by Eskimo sub-groups living in the Nome area, such as the King Island community, Diomede Islanders, and St. Lawrence Islanders. While biological effects to a subsistence population for the entire study area would be moderate to low, effects on the Nome/Cape Nome region would be concentrated in areas used by the region's subsistence hunters.

Because subsistence activities within the Nome/Cape Nome region may be adversely affected (during the development & production stage) as described in the preceding

paragraphs (i.e., subsistence activities may be adversely affected by the low levels of noise and disturbance, biological effects to a subsistence population from a potential oil spill would be concentrated in areas used by the region's subsistence hunters), restrictions to the subsistence uses of the Nome/Cape Nome region may be significant. One or more important subsistence resources could become unavailable to one or more villages for a period of 1 year or less. If an oil spill occurred, marine and coastal birds would most likely suffer local population losses; a species of spawning fish or the walrus population may also be affected (see Secs. IV.B.1.b, c, and d and IV.B.2.a Sale 100 DEIS). Although such effects probably would not decrease the total amount of subsistence foods in the diet, they would affect the relative amounts of the various subsistence foods consumed. People may, for example, be forced to forego preferred foods such as seabirds and eat less desirable foods. Such effects also would increase the expenditure of time and/or money necessary for adequate harvests and thus raise the cost of subsistence.

It is unlikely that more than one or two villages would experience such restrictions. It is unlikely that these restrictions would last more than 1 or 2 years; such restrictions on subsistence would be community-wide and measurable. Although these are not the most likely consequence (there is only a 13-percent chance or less under current estimates of finding commercial quantities of oil), they are likely to occur if production occurs.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* The limited and short-term effects on populations of harvestable resources by exploration activities have not restricted and will not significantly restrict subsistence uses.
- *Development and Production:* The development and production stage of the proposal may significantly restrict

subsistence uses in the Nome/Cape Nome region if oil is discovered in economically recoverable quantities.

b. *Potential to Reduce Availability of Resources by Alteration of Their Normal Distribution Patterns:* Given the extensive distribution and numbers of fishery resources, birds, and marine mammals within the study area, small alterations in species-distribution patterns should not significantly restrict the subsistence uses of Norton Sound communities.

If the development and production stage of the proposal is reached, 54 hectares of habitat loss will occur at Cape Nome due to onshore facility siting from both Sales 57 and 100. Airplane and helicopter traffic may result in minor amounts of disturbance to bird nesting areas but should not significantly affect the important bird rookeries on St. Lawrence, King, and Little Diomede Islands. Changes in distribution will be local and involve small numbers of birds. Marine mammals may be temporarily displaced from environs immediately surrounding construction sites; but this displacement, along with changes associated with air and vessel traffic routes, is not expected to be significant. Such temporary displacement may, on occasion, inconvenience subsistence hunters, causing a group to hunt longer or make an extra trip. The displacement which does occur may be concentrated in the Nome/Cape Nome region. However, this displacement should not, by itself, affect the overall amounts or types of harvests.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not altered and will not alter normal distribution patterns of any subsistence resources in any of the four regions of the proposal: Inner Norton Sound, the Yukon River Delta, St. Lawrence Island, or Nome/Cape Nome.
- *Exploration:* Exploration activities have not reduced and will not significantly reduce the availability of subsistence resources in any of these four regions by changing the normal distribution pattern of a species.

• *Development and Production:* Development and production activities are not likely to significantly restrict the availability of subsistence resources by altering their normal distribution patterns in any of these four regions.

c. *Limitation of Access to Subsistence Resources:* The leasing action did not and will not limit access to subsistence resources because it included only the administrative action of leasing and the preliminary activities associated with leasing. There are no population changes anticipated to occur in connection with the sale and associated preliminary activities. While some species may avoid seismic boats, such avoidance would be intermittent and of extremely short duration. The exploration stage of Sale 57 also has not limited and will not significantly limit access to these resources. Some species may avoid seismic boats, supply boats and helicopters, and exploratory platforms but such disturbances are localized, intermittent, and of short duration. Moreover, most of these exploratory operations occur far from shore. Exploratory activities have not increased and will not significantly increase Nome's population. If the development and production stage is reached, there will be approximately 4 oil production platforms due to Sale 57. If commercially recoverable natural gas is discovered, there will be 6 gas production platforms. These would be located far from shore. Oil storage facilities in the Nome/Cape Nome area would cover approximately 30 hectares of land (see DEIS 100). When the total area available to subsistence uses is considered, this amount of land is not significant. If the development and production stage of the proposal is reached, the population of Nome is expected to increase by less than 300 people due to Sale 57. Most of the increase would consist of non-Native oil workers who would remain uninvolved with subsistence activities. The population of the other communities in the study area is not expected to increase due to the proposal. Improved transpor-

tation systems may encourage a small increase in the number of sports hunters and fishermen who enter the sale area. However, this increase should be too small to offer significant competition with subsistence activities. Neither the lands used for production and development due to Sale 57, nor the population changes due to the sale, are expected to have significant effects on access to subsistence resources.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration has not limited and will not limit access to subsistence resources in any of the four regions of the proposal: Inner Norton Sound, the Yukon River Delta, St. Lawrence Island, or Nome/Cape Nome.
- *Exploration:* Exploration activities have not limited and will not significantly limit access to subsistence resources in any of the four regions.
- *Development and Production:* The proposal should not significantly limit access to subsistence resources in any of the four regions.

2. *Availability of Other Lands:* In determining the area to be offered for lease, the Secretary of Interior did consider other lands. Alternative I, the proposal, included 429 tracts. The Secretary offered for lease 418 tracts; 11 tracts, 12 miles from the Yukon River Delta were deleted in response to subsistence and environmental concerns.

For a detailed discussion on the effects on subsistence uses under the proposal (Alternative I), see Sale 57 EIS. The EIS at 142 explained with respect to development & production associated with the proposal (Alternative I):

> "While some changes in local subsistence use and take may occur, the probability of significant disturbance . . . is unlikely for the region as a whole."

Other alternatives considered by the Secretary of Interior and analyzed in the 57 FEIS are as follows:

Alternative IV would delete 121 blocks from the proposed sale area in the northern portion of Norton Sound. This would decrease by 46-percent the number of oil spills expected over that of the proposal and a 46-percent decrease in the expected production of recoverable resources. While this alternative would not significantly reduce major potential impacts on the human and biological resources of the Sound, some reductions in potential risk from oil spills could be expected for the northern coast of Norton Sound.

Alternative V would delete 181 blocks in the eastern half of the proposed sale area. This would decrease by 80-percent the expected number of oil spills expected over that of the proposal and a 80-percent decrease in expected resource recovery. This alternative would significantly reduce major potential effects on the human and biological resources of the Norton Sound area.

Alternative VI would delete 157 blocks in the southern portion of Norton Sound. According to USGS resource estimates, no oil is expected to be found in these deleted blocks. Therefore, the expected number of oil spills and the potential effects from oil spills would be the same as for the proposal. If commercial quantities of oil are located in the southern deletion blocks, it would pose significant potential effects to the Yukon Delta. Hence, this alternative significantly reduces the potential for oil-related effects to the Yukon Delta region.

3. *Other Alternatives:* A brief discussion of the no-sale alternative and the delay-the-sale alternative is provided below. The remaining alternatives are discussed above in Availability of Other Lands. Alternative II (no sale) would result in no adverse effects on the study area's subsistence patterns. Effects on subsistence use patterns of Alternative III (delay the sale) would be the same as those for the sale, only delayed.

4. *Discussion:*

• *Lease Sale:* The actual lease sale for Norton Basin Sale 57 is an administrative action consisting of offers, bids, evaluations, and lease awards. The only oil- and gas-related activities that occur as a direct result of awarding leases are preliminary activities. As defined in 30 CFR 250.34, such activities do not result in any significant adverse effect on the natural resources of the outer continental shelf and would not have a significant effect on subsistence uses in any of the four regions of the study area.

• *Exploration:* Exploratory activities, including seismic investigations undertaken as a result of leases and exploratory drilling, have occurred as a consequence of the lease sale and their effects have been examined. These activities could result in effects from site-specific seismic investigations, exploratory drilling, accidental spills, discharge of formation waters and drilling muds, noise, traffic from boat- and aircraft-support activities, onshore support facilities, local population increases, and oil- and gas-related employment. The exploratory operations have been considered in this 810 analysis and found not to significantly restrict subsistence uses in any of the four regions of the study area.

• *Development and Production:* Development and production activities would be expected to occur if economically recoverable hydrocarbons are discovered. Finding economic quantities of recoverable oil and the development and production of that oil is given a 13-percent chance of happening under current estimates. Development and production activities consist of the drilling of additional wells; the construction of pipelines and storage facilities, loading facilities, shorebases; tankering, traffic, and planned and accidental discharges. Of these activities, oil spills have the most potential to have unavoidable adverse effects on subsistence uses; other activities are of less concern.

This 810 evaluation assumes that, if the development and production stage occurs, one or more oil spills of 1,000 barrels or greater will occur during the productive life of the field. According to the Sale 57 FEIS, a 14-percent chance exists of discovering oil in commercial quantities. A 94-percent chance exists of an oil spill of 1,000 barrels or greater occurring if such quantities of oil are discovered. However, because of new information these figures have been revised downward. According to the Sale 100 DEIS, only a 13-percent chance exists of discovering commercially recoverable oil in the Sale 57 area; if oil is found in these quantities, there is only a 78-percent chance of one or more spills of 1,000 barrels or greater.

Given these figures, it is extremely unlikely that an oil spill would occur and contact the nearshore populations of mammals, fish, and birds used for subsistence by inner Norton villages (Golovin, Elim, Moses Point, Koyuk, Shaktoolik, Unalakleet, St. Michael and Stebbins) or used by villages on the Yukon Delta (Kotlik, Emmonak, Alakanuk, Mountain Village, St. Mary's, and Sheldon Point). The probabilities of such an event are less than 1 percent. Significant changes in the populations and distributions of subsistence species, or limitations to access, are not expected. For these reasons, this evaluation demonstrates that no significant restriction of subsistence uses in inner Norton Sound or on the Yukon Delta is foreseeable from the lease sale.

Given the oil-spill-risk figures for Sale 57, less than a 20-percent probability exists that the subsistence-use area of one or more villages in the St. Lawrence Island or Nome/Cape Nome regions may be contacted by an oil spill of 1,000 barrels or greater, if an oil spill occurs. An oil spill is unlikely unless development and production occurs. The possibility of a spill contacting the shore or nearshore environment is less. It is not likely that such a spill would cause a subsistence species to become unavailable to

a community for more than 1 year or that the spill would reduce the total amount of subsistence foods consumed by humans in the affected community. Such a spill could, however, damage one or more local subsistence resources enough to make them unavailable for 1 year or less or to make them more difficult to hunt. Thus, an oil spill could significantly raise the costs of subsistence production for 1 year, force a change in the relative amounts of the various subsistence resources consumed, and/or cause communities to consume stored subsistence foods. However, the low levels of noise and traffic disturbance that could occur during the development and production stage would be concentrated in the Nome/Cape Nome and, to a lesser extent, in the St. Lawrence Island regions, and these levels may affect subsistence uses.

Because of the oil-spill risks to biological resources and because of the geographical distribution of support facilities and transportation routes, we have found that Sale 57 may have a significant restriction on the subsistence systems of the Nome/Cape Nome and/or St. Lawrence Island regions if the development and production stage is reached and if a spill occurs. Although this is not the most likely event, there is a possibility that one or more subsistence resources may become locally unavailable for a period not exceeding 1 or 2 years. It is likely that few such events (two or fewer) would occur. Moreover, should an oil spill occur it would not affect the Norton Basin region as a whole. However, the effect of an oil spill on the subsistence system of the local Nome/Cape Nome and/or St. Lawrence Island regions would likely be significant. For affected villages, the cost of subsistence production could be raised for 1 or 2 years, the types of subsistence resources consumed could be changed for 1 or 2 years, and the amounts of subsistence resources stored or shared within and outside the affected community could drop.

5. *Findings:*

• *Lease Sale:* The actual lease sale for Sale 57 and associated preliminary activities prior to exploration will not significantly restrict subsistence uses.

• *Exploration:* Exploratory activities due to Lease Sale 57 are not likely to significantly restrict subsistence uses.

• *Development and Production:* Included above is an analysis of the development and production stage of the proposal based on hypothetical development scenarios and a 13-percent possibility of finding economically recoverable oil. Currently, no activities are proposed that would restrict subsistence uses. Significant restrictions on subsistence areas are not likely for the Norton Basin region as a whole. However, we have found that if the development and production stage is reached, a significant restriction of subsistence uses may occur in certain localities.

Although this finding is based upon reasonable and valid assumptions, there is a great deal of uncertainty about the precise location, timing, or level of intensity of either future exploration or development and production.

Therefore, if future exploration plans are submitted to MMS for review and approval, the possible effects on subsistence uses will again be analyzed pursuant to section 810 of ANILCA before these plans are approved. If discoveries are made and development and production plans are submitted to MMS, they too will be subjected to review under section 810 before approval.

However, given the low probability that oil will be found, these possible restrictions are not likely to occur, even locally, as a result of the sale.

APPENDIX K

UNITED STATES DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE
ALASKA OUTER CONTINENTAL SHELF REGION
ANCHORAGE, ALASKA

OCS ENVIRONMENTAL ASSESSMENT
EA No. AK 84-10
December 1984

Operator *Exxon Company, U.S.A.* *Lease* *Block*
Plan Type *Exploration*
Area *Sale 83* (Navarin Basin) OCS-Y (See Page 1)
Platform *N/A*
Date deemed complete
November 28, 1984

Prepared by
Office of the Regional Supervisor
Leasing and Environment

Related Environmental Documents

U.S. DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Final Environmental Impact Statement, Proposed 5-Year OCS Oil and Gas Lease Schedule, March 1980 to February 1985

OCS Environmental Assessment, EA No. AK 81-06, Deep Stratigraphic Test Well Program, Bering Sea, Navarin Basin

Final Environmental Impact Statement, Navarin Basin, (OCS Lease Sale No. 83). March, 1984.

Draft Environmental Impact Statement St. George Basin (OCS Lease Sale No. 89). May, 1984

Final Environmental Impact Statement St. George Basin (OCS Lease Sale No. 70). August, 1982.

In Section II. F. of the ER, it is stated that current plans call for a support vessel to be temporarily moored offshore St. Matthew to store supplies, and to be used as an alternate helicopter landing base and refueling stop. A barge was previously moored off St. Matthew Island in support of the Navarin Basin DST well. In addition, air transit over or near St. Matthew is judged to be necessary to ensure flight safety contingencies. According to the Navarin FEIS (Section III, E. 1.), increased presence of man (i.e., air and vessel visibility and noise) would reduce the perception of the island's remoteness which is a major component of solitude and an exceptional value of the island.

G. *SUBSISTENCE, SECTION 810 (ANILCA) EVALUATION AND FINDING*

Summarized is an evaluation of effects of the proposed EP on subsistence uses and needs, the availability of other lands, and other alternatives which would reduce or eliminate the use of the tracts needed for subsistence purposes.

ANILCA (Public Law 96-487, 94 § 2371-2251) provides in Title VIII, section 810 that:

"(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency:

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law."

1. *Evaluation*

Subsistence resources and uses in the potentially affected area are discussed in the following documents:

Exxon's ER, Chapter III, Section D.11.

Navarin FEIS, (Sale 83 area) Chapter III, Section D.3.
St. George FEIS (Sale 70 area), Chapter III, Section C.2.
St. George DEIS (Sale 89 area), Chapter III, Section C.3.

No subsistence activities take place in the vicinity of Exxon's leases except for the seafood resources harvested by commercial fishermen for subsistence purposes. However, species utilized for subsistence purposes either occupy or traverse the Navarin Basin OCS lease area during portions of the year. The discussion of subsistence use areas in these documents can be divided into two groups of potentially affected areas: 1) Host Communities (of petroleum industry support operations)—Unalaska, Cold Bay, and St. Paul and St. George on the Pribilof Islands; and 2) Bering Strait Island Communities (Bering Sea Large-Mammal-Hunting Communities)—Gambell and Savoonga on St. Lawrence Island, Little Diomede, and King Islanders in Nome (as well as other Bering Strait Islanders living in Nome and the village of Wales on the Seward Peninsula). The discussion in the EIS's also includes a forecast of future subsistence trends.

The Navarin Basin EIS and the two St. George EIS's listed above are based on scenarios with varying probabilities which include exploration, development and production. Therefore, the effects on subsistence of the proposed exploration was approximated by appropriate reductions in probable effects.

a. *Factors Affecting Subsistence Uses and Needs*

To determine the potential significant effects on subsistence uses and needs, the following three potential effects have been considered.

(1) *Potential to reduce the population of harvestable resources.*

Harvestable resources can be reduced by detrimental physical events such as noise disturbance from offshore oil and gas activities and oil spills and increased human harvesting (due to increased population pressure) on available resources.

Host Communities

The identification of subsistence resources used by residents of host communities is in the Navarin FEIS (Sale 83 area) Chapter III, Section D.3.a.1 and 2.

Unalaska and Cold Bay. The potential reduction of harvestable resources is discussed in the Navarin FEIS (Sale 83 area) Chapter IV, Section B.3.c.1. Since no new facilities are proposed in either of these communities, the only possible reduction in the population of subsistence resources would occur due to increased human population. Due to the limited duration (May to January) and small size of project-induced population increase (14 people at the service base in Dutch Harbor), no significant reduction of subsistence resource populations would be expected.

St. Paul and St. George. The Navarin FEIS (Sale 83 area) did not consider the effects of the potential use of these Pribilof Islands' communities as host communities. The St. George FEIS (Sale 70 area) and the St. George

DEIS (Sale 89 area) discussed the use of St. George Island as the site of an oil terminal in support of production which would employ 200 persons annually. The St. George DEIS (89) concludes that this additional population would not have a significant effect on subsistence resources. Given the limited duration (May to January) and small size of the proposed exploration project-induced population increase (47 people in a small enclave at the airport on St. Paul), no significant reduction of subsistence resource populations would be expected.

Effects on subsistence resources of the Pribilof Islands of oil spill effects are discussed in the St. George FEIS (Sale 70 area), Chapter IV, Section E. 2. b. and St. George DEIS (Sale 89 area) Chapter IV, Section B. 1. b. 3. The primary adverse effect on subsistence resources would result from an oil spill on fur seals. However, according to Exxon's (OSCP), Chapter 8, for the proposed exploration, the probability of a major oil spill (1000 barrels or more) is "extremely remote". Minor oil spills (spills less than 1000 barrels), according to the Navarin Basin FEIS, "tend to be caused by human error or carelessness and can be considered potentially mitigable; for example, by better training or operation procedures." Even if an oil spill occurred, the trajectory analysis in the Oil Spill Risk Analysis (OSRA) and the OSCP for the proposed exploration project indicated a less than 0.5 percent probability that the spill would contact the Pribilof Islands area.

Bering Strait Villages

The effects on subsistence resources used by Bering Strait villages is discussed in the Navarin FEIS (Sale 83 area) Section IV.B.c.2. Effects on large marine mammals could be expected from noise disturbance from offshore oil and gas activities and oil spills. The FEIS states that "from the standpoint of subsistence species abundance, there appears to be little cause for concern".

(2). *Potential to reduce availability of resources by alteration of their normal distribution patterns.*

Distribution patterns of subsistence resources are described in the Navarin FEIS (Sale 83 area) and in the St. George FEIS (Sale 70 area) and St. George DEIS (Sale 89 area).

Host Communities

Unalaska and Cold Bay. No reduction in availability of resources by alteration of their normal distribution patterns would be expected because no facilities are to be constructed and the increases in air and vessel traffic would be small and temporary.

St. Paul and St. George. Normal distribution patterns could potentially be altered by oil spills and air and vessel traffic noise. The low probability of oil spills, the limited number of aircraft and vessels, and the limited duration of proposed use leads to a conclusion that no reduction in availability of resources by alteration of their normal distribution patterns would be expected.

Bering Strait Villages

The Navarin FEIS (Sale 83 area) states that "momentary noise disturbance of bowhead whales, walrus, or seals either passing through the area south of St. Lawrence Island or resident in the area is more likely with the proposal, but these disturbances are not likely to divert these marine mammals from their normal migration routes". The OSCP and OSRA (Navarin Basin FEIS (Sale 83 area) [*sic*] results for the St. Lawrence Island area (the closest of the group to the proposed exploration wells) indicate low probabilities of contact. Therefore, in conclusion, as stated in the Navarin FEIS, "subsistence resources are relatively abundant and distribution patterns of whales and walrus are expected to be relatively unaffected by the operations associated with the proposal (Lease Sale 83), given sufficient noise suppression measures are enforced during spring and summer months".

(3). *Limitations of access to subsistence resources.*

Subsistence use areas are described in the Navarin FEIS (Sale 83 area) and in the St. George FEIS (Sale 70 area) and St. George DEIS (Sale 89 area).

Access to subsistence resources should not be significantly affected by the proposed project. Access to fishery and marine mammal resources is via boats and as long as normal marine safety practices are followed no limitations on marine access would be expected. Access to terrestrial animals and birds should not be affected because no new facilities are proposed for Unalaska, Cold Bay, or any of the Bering Strait villages, and the new facilities proposed at the St. Paul airport should not limit access.

b. *Availability of Other Lands.*

Within or around the Navarin Basin lease area, there are no other lands that could be used for the proposed exploration plan at the present time. The use of St. Matthew Island, which is not used for subsistence purposes, is unavailable at this time due to legal challenges to its use as a forward support base.

In regard to alternative drilling sites, as stated in the ER, "based upon available information, there is no indication that any particular well site in the leased areas would be preferred over another based solely on biological criteria."

c. *Other Alternatives.*

Alternatives to the proposed action are discussed in Appendix H, of the St. George Basin FEIS (Sale 70 area), entitled "Alternative Energy Sources as an Alternative to the OCS Program."

2. *Findings*

Significant restrictions are differentiated from insignificant restrictions by a process assessing whether the action undertaken will have no slight effect as opposed to large or substantial effects. No significant restriction results when there would be no or a slight reduction in the abundance

of harvestable resources and "occasional" predistribution of these resources.

In light of this definition the determination of significant restriction must be made on a reasonable basis, since it must be decided in light of the total subsistence lands and water resources that are available to individuals in the surrounding areas, living a subsistence lifestyle.

This evaluation demonstrates that no significant restriction of subsistence uses is reasonably foreseeable from the proposed EP in the Navarin Basin.

IV. ALTERNATIVES TO THE PROPOSED ACTION

A. *NO ACTION*

No action would require disapproval of the activity as proposed. Under existing laws and terms of the lease, the Department Of Interior must positively respond to legitimate requests to drill on valid leases, provided all terms and conditions are met. In light of the above, no action is not considered to be a reasonable alternative.

B. *RELOCATION OF DRILL SITE*

Relocation of the proposed drill sites to different parts of the lease would be an alternative. Based on available data, no increase in the possibility of locating hydrocarbons or decrease in potential environmental impacts would result. The lease sale decision was made and the leases were issued for the purpose of oil and gas exploration and production should commercial discoveries be made.

V. UNAVOIDABLE ADVERSE ENVIRONMENTAL EFFECTS

A. *UNCONTROLLED OIL FLOW*

The probability of encountering hydrocarbons at any depth which could cause a blowout is reduced by drilling the proposed wells according to the Alaska OCS Orders and utilizing standard well control equipment and procedures. The casing and cementing programs (Alaska OCS Order No. 2) and subsequent abandonment requirements (Alaska OCS Order No. 3) are designed to prevent leakage and contamination of fluids within a permeable zone.

APPENDIX L

STATUTE INVOLVED

1. Section 102 of ANILCA, 16 U.S.C. 3102, provides in relevant part:

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

2. Section 801 of ANILCA, 16 U.S.C. 3111, provides:

The Congress finds and declares that –

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is neccessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for

the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

3. Section 805 of ANILCA, 16 U.S.C. 3115, provides, in relevant part:

(a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decision-

making process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsiblity pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be

detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

4. Section 810 of ANILCA, 16 U.S.C. 3120, provides:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such

actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

5. Section 815 of ANILCA, 16 U.S.C. 3125, provides in relevant part:

Nothing in this title shall be construed as—

* * * * *

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

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STATEMENT OF THE CASE

Amici adopt petitioners' statements of the case as set out in their petitions for writ of certiorari.

SUMMARY OF ARGUMENT

1. Amici adopt and incorporate herein by reference petitioners' arguments on the ability of trial courts to exercise equitable discretion in granting injunctive relief as articulated by this Court in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

2. Amici adopt and incorporate herein by reference petitioners' arguments on the proper construction of Section 810 of ANILCA, 16 U.S.C. § 3120, within the context of the tiered decision-making process of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.*, as prescribed by this Court in *Secretary of the Interior v. California*, 464 U.S. 312 (1984).

3. The Ninth Circuit's pronouncement that Congress decided in ANILCA to prefer the protection of subsistence resource use over environmentally sound, expeditious OCS energy development is without foundation in legislative history and contrary to expressed congressional intent.

ARGUMENT

LEGISLATIVE HISTORY CLEARLY ESTABLISHES THAT CONGRESS HAS NOT CHOSEN TO PREFER SUBSISTENCE USE INTERESTS OVER REASONABLE OCS DEVELOPMENT

In reaching its decision in *People of the Village of Gambell v. Hodel*, 774 F.2d 1414, the Ninth Circuit appears to engage in the traditional analysis of the propriety of granting or withholding injunctive relief.[1] In so doing, the court passes on its assessment of the competing public interests then before the court. *Id.* at 1425-26. In a section of its public interest analysis dealing with this Court's decision in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, the Ninth Circuit reaches the wholly unexpected conclusion that "[i]t appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration."[2] Having reached this conclusion in order to bolster its *per se* injunction rule by appealing to this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Ninth Circuit repeats this assertion and even amplifies it in its conclusion:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must *prevail over our possible energy needs.* Thus, the denial of a preliminary injunction was error because the court misapplied the

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[1] *See People of the Village of Gambell v. Hodel*, 774 F.2d at 1419-28, for the court's treatment of the usual factors of: (1) probable success on the merits; (2) balance of harms; and (3) public interest.

[2] *Id.* at 1426 n.2.

> law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *People of the Village of Gambell v. Hodel*, 774 F.2d at 1428 (emphasis added).

The assertion of a congressional preference for subsistence use preservation is thus central to the court's decision. Such an assertion is ungrounded in legislative history, and is, in fact, directly contrary to expressed congressional intent.

Senate Report No. 413, 96th Cong., 2nd Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

The Ninth Circuit's decision in *People of the Village of Gambell v. Hodel, supra,* is utterly and inexplicably silent on this language. The court, quoting itself in *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984), noted that Section 810(a) was enacted " 'to benefit

the Natives,' and to be 'consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.' " *People of the Village of Gambell v. Hodel,* 774 F.2d at 1425, citing *People of the Village of Gambell v. Clark,* 746 F.2d at 581, *quoting,* 126 Cong. Rec. 29,279 (1980). Consistency and benefit do not amount to a substantive preference in the face of congressional language unavoidably establishing the *procedural* character of the section.

Congress established a procedural requirement that subsistence uses be integrated into the decision-making processes of federal land managers in Alaska. Congress foresaw that even after taking subsistence uses into consideration, there would be occasions when subsistence uses could be adversely affected.[3] There is no support whatsoever for the position of the Ninth Circuit that Congress intended by Section 810 to create a substantive preference for the protection of subsistence uses over the environmentally sensitive provision of this country's vital energy needs.

CONCLUSION

In reaching its decision in *People of the Village of Gambell v. Hodel, supra,* interpreting the relationship between the requirements of Section 810(a) of ANILCA, 16 U.S.C. § 3120(a), and the Outer Continental Shelf Lands

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[3] 1980 U.S. Code Cong. & Ad. News 5178.

Act Amendments of 1978, and announcing its *per se* rule of mandatory injunctive relief for a *prima facie* violation of an environmental or conservation statute, the Ninth Circuit relied on a mistaken assessment of national policy concerning Alaskan subsistence uses as indicated by congressional intent. This mistaken assessment has had serious negative impacts on amici, and because of the continuing possibility for erroneous construction of national policy should the Ninth Circuit's position not be corrected, amici respectfully urge this Court to grant the writs of certiorari requested by petitioners.

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Respectfully submitted,

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